RESIGNATIONS AND REMOVALS: A HISTORY OF FEDERAL JUDICIAL SERVICE–AND DISSERVICE–1789-1992

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Thomas Jefferson's dismay over the failed impeachment of Supreme Court Justice Samuel Chase in 1805 led him later to complain that "impeachment is not even a scarecrow."[1] Subsequent events have proven Jefferson wrong. Although the full panoply of the impeachment process has been used rarely, its existence has given Congress an impressively big stick to wield in persuading miscreant judges to leave the bench.[2] Since Jefferson's time, our experience has suggested two important conclusions about judicial discipline and removal. The first is that investigations, threats of investigations, and threats of impeachment can be very powerful tools in inducing judges to resign from office voluntarily. The second is that these tools have a great potential for misuse.

Judicial independence is a core value supported by the constitutional structure of the federal judiciary. The appointment process, salary protection, and removal mechanism are all means to ensure that federal judges be independent and impartial in their decision-

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[1] 7 THE WRITINGS OF THOMAS JEFFERSON 256 (H.A. Washington ed., 1859).

[2] *See* Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment As the Exclusive Removal Mechanism for Federal Judges,* 38 UCLA L. REV. 1209, 1209 (1991) (noting comment by British observer James Bryce that the impeachment process was like "a hundred-ton gun").

making. On the other hand, judicial independence was probably not intended to trump judicial accountability for misbehavior.[3] Just as we value holding judges accountable for behavior deviating from high standards of probity in order to insure, among other things, public confidence in the judiciary, the protection of judicial independence is intended to support impartial decision-making for the benefit of litigants and society, not for the benefit of individual judges.[4] The balancing of independence and accountability has never been easy; history shows that privileging one above the other can carry serious costs.[5] For Jefferson, the costs of judicial independence overwhelmed its benefits after the defeated Federalists retreated into the judiciary at the end of John Adams's presidency. The vehemence of his rejection of judicial independence, and his proposed means to control judges, highlight just how fragile a concept independence can be in the face of partisan differences:

> Before the canker is become inveterate, before its venom has reached so much of the body politic as to get beyond control, remedy should be applied. Let the future appointments of judges be for four or six years, and renewable by the President and Senate. This will bring their conduct, at regular periods, under revision and probation, and may keep them in equipoise between the general and special governments. . . . That there should be public functionaries independent of the nation, whatever may be their demerit, is a solecism in a republic, of the first order of absurdity and inconsistency.[6]

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[3] In addition to disagreement over the relative weights to be given independence and accountability, commentators also disagree about what behavior judges can be held accountable for. Some people believe that judicial accountability extends only to misbehavior in office, whereas others feel that it extends to both judicial and nonjudicial malfeasance. *See, e.g.*, Wrisley Brown, *The Impeachment of the Federal Judiciary*, 26 HARV. L. REV. 684, 692 (1913) ("[T]he . . . offense need not necessarily be committed under color of office.").

[4] *But see* RUSSELL WHEELER, JUDICIAL ADMINISTRATION: ITS RELATION TO JUDICIAL INDEPENDENCE 12 (1988) (arguing that the framers of the Constitution, taking human nature into account, intended judicial independence to foster the desire of judges as individuals to achieve fame).

[5] The writing on judicial discipline and removal is voluminous. *See, e.g.*, Federal Judicial History Office, Federal Judicial Ctr., The History of Judicial Discipline and Removal in America: A Preliminary Working Bibliography (June 1992) (prepared for the National Commission on Judicial Discipline and Removal); KEVIN R. CORR & LARRY BERKSON, LITERATURE ON JUDICIAL REMOVAL (1992); THOMAS C. KINGSLEY, THE FEDERAL IMPEACHMENT PROCESS: A BIBLIOGRAPHIC GUIDE TO ENGLISH AND AMERICAN PRECEDENCE [SIC], HISTORICAL AND PROCEDURAL DEVELOPMENT AND SCHOLARLY COMMENTARY (1974).

[6] 7 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 1, at 256.

The question we are left with is the same one that attends most constitutional issues: What costs are we willing to incur as we weigh one value against another?[7]

In an impeachment proceeding, the House brings articles of impeachment (the equivalent of indictment) and, upon delivery of impeachment articles, the Senate tries the accused judge.[8] Upon conviction by two-thirds of the Senate, the judge is removed from office, and may also be barred from holding other federal office in the future.[9] No other punishment by the Senate is constitutionally permissible.[10] In fact, it might come as a surprise to many that conviction of a felony does not automatically result in forfeiture of office and disbarment for federal judges. The Constitution vests sole impeachment power in the Congress,[11] and theories of other constitutional means of removal have not prevailed to date.[12]

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[7] For an illuminating discussion of this crucial point, see RUSSELL R. WHEELER & A. LEO LEVIN, JUDICIAL DISCIPLINE AND REMOVAL IN THE UNITED STATES 59-60 (1979). Wheeler and Levin note that

> [i]t is important to take care to distinguish reasoned appeal to the need to preserve judicial independence from less justifiable references to this principle. "Judicial Independence" is not a talismanic phrase that justifies a veto of any and all proposals for new disciplinary mechanisms. Sometimes it appears to be no more than an automatic reflex: the assertion of the need for such independence seems at times to be used as a tactical ploy to hide other, less reasonable objections to a particular proposal. Cheapening the argument in this way is unfortunate, for it clouds the issue and makes it more difficult for sponsors of proposals to appreciate insidious threats to such independence that may in fact exist.

Id. at 73-74.

[8] *See* U.S. CONST. art. I, § 2, cl. 5 (vesting the "sole Power of Impeachment" in the House of Representatives); *id.* art. I, § 3, cl. 6 (granting the Senate the "sole Power to try all Impeachments"). For a discussion of the impeachment mechanism, see ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 21-22 (1992).

[9] *See* U.S. CONST. art. I, § 3, cl. 6-7.

[10] *See id.* ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States . . . .").

[11] Under Article II, Section 4 of the U.S. Constitution, "all civil Officers of the United States . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." *Id.* art. II, § 4. Article I, Section 2, Clause 5 rests the "sole Power of Impeachment" in the House of Representatives, *id.* art. I, § 2, cl. 5, and Article I, Section 3, Clause 6 gives the Senate "the sole Power to try all Impeachments." *Id.* art. I, § 3, cl. 6.

For a discussion of whether these clauses represent the sole constitutional means for removing federal judges (with the exception of judges appointed under Article I), see Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 213-23 (1993).

[12] Although the Constitution does place the impeachment power with Congress,

The impeachment process, including trial by the Senate, has historically been cumbersome and often protracted. Over the years many members of Congress have found the process to be excessively time consuming and deleterious to the handling of more pressing affairs.[13] Indeed, Congress has impeached only thirteen judges since 1789, and only seven were eventually removed from the bench.[14] Since the 1930s, the impeachment mechanism has fallen into disuse as Congress increasingly relies on Justice Department

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a number of scholars argue that the Constitution does not preclude removal by other means. Prominent among these scholars was Burke Shartel, who wrote a series of articles in the 1930s recommending alternate means of removal under the "good behavior" clause of Article III; more recently the foremost proponent of this view is Raoul Berger. *See* Burke Shartel, *Federal Judges–Appointment, Supervision, and Removal–Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 898 (1930); Burke Shartel, *Retirement and Removal of Judges*, 20 J. AM. JUDICATURE SOC'Y 134 (1936); *see also* Raoul Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475 (1970).

[13] For a brief discussion of some of the congressional reactions to impeachments over the last 200 years, see Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763, 765 (1988), and Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643, 644-48 (1988).

[14] The thirteen are: John Pickering (1804) (convicted and removed); Samuel Chase (1805) (acquitted); James H. Peck (1830) (acquitted); West H. Humphreys (1862) (convicted and removed); Mark H. Delahay (1872) (resigned after impeachment but before completion of process); Charles H. Swayne (1905) (acquitted); Robert W. Archbald (1913) (convicted and removed); George W. English (1925) (resigned after impeachment but before completion of process); Harold Louderback (1932) (acquitted); Halsted L. Ritter (1936) (convicted and removed); Harry Claiborne (1986) (convicted and removed); Alcee L. Hastings (1989) (convicted and removed); and Walter L. Nixon, Jr. (1989) (convicted and removed). *See* Grimes, *supra* note 2, at 1214 n.32.

For a catalog of impeachment proceedings not leading to trial, see *id.* at 1214 n.32; JOSEPH BORKIN, THE CORRUPT JUDGE: AN INQUIRY INTO BRIBERY AND OTHER HIGH CRIMES AND MISDEMEANORS IN THE FEDERAL COURTS 219-59 (1962) (providing data on position, charges, and disposition of cases against federal judges whose official conduct has been subject to judicial inquiry); 6 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ch. 202 (1935) [hereinafter CANNON'S PRECEDENTS] (describing impeachment proceedings during 1908-31 that did not result in trial); 3 LEWIS DESCHLER, DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES ch. 14, §§ 16-17 (1979) [hereinafter DESCHLER'S PRECEDENTS] (describing impeachment proceedings against Judges English and Louderback); Grimes *supra* note 2, at 1214 n.32; 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES chs. 71-74, 77-79 (1907) [hereinafter HINDS' PRECEDENTS] (describing impeachments and trials of Judges Pickering, Chase, Peck, Humphreys, and Swayne, as well as impeachment proceedings not resulting in trial between 1796 and 1895); EMILY F. VAN TASSEL, WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE, 1789 TO 1992 app. (1993).

prosecutions or informal pressure from other sources to induce misbehaving judges to resign voluntarily, without resort to impeachment and trial.[15] Congress has regularly revisited the problem of judicial discipline and removal, but until recently the inherent problem with relying on noncongressional means of ridding the bench of problem judges has been masked by the fact that many judges about whom serious allegations have been made have chosen voluntary resignation. In 1973, for the first time in American history, a sitting federal judge was actually convicted of a crime and sentenced to prison.[16] He resigned from the bench once all his appeals were exhausted and prison became inevitable.[17]

Recently, however, there has been significant exposure of the flaw in relinquishing the removal of federal judges to the criminal justice system: except for voluntary resignation, death, or impeachment, there is no constitutional means to forcibly remove a federal judge from the bench.[18] Since 1980, the Department of Justice sought and obtained indictments against five sitting U.S. judges on charges ranging from income tax evasion to bribery.[19] None of the five judges chose to resign. Indeed, Judge Harry Claiborne drew his salary for two years while in jail, and he vowed to return to his seat on the U.S. District Court for Nevada before Congress finally removed him through the impeachment process in 1986.[20]

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[15] *See* Grimes, *supra* note 2, at 1216. Until recently, this phenomenon seems to have been masked by the fact that many judges against whom serious allegations have been leveled have chosen voluntary resignation over the impeachment process.

[16] A former Illinois governor, Judge Otto Kerner, Jr., of the U.S. Court of Appeals for the Seventh Circuit, was prosecuted for acts committed before he was appointed to the bench. Although he did not resign until his appeals were exhausted, he stopped hearing cases at the time he was indicted. *See infra* notes 266-69 and accompanying text.

[17] *See infra* note 269 and accompanying text.

[18] *See supra* notes 11-12; *see also infra* notes 235-38 and accompanying text (discussing the refusal of Judge Herbert Fogel to resign from the bench in the face of investigations by the Justice Department).

[19] The judges were Robert Aguilar (D. Cal.), Harry Claiborne (D. Nev.), Robert Collins (D. La.), Alcee Hastings (D. Fla.), and Walter Nixon (D. Miss.). Judges Robert Aguilar, Robert Collins, Harry Claiborne, and Walter Nixon were convicted, and Judge Alcee Hastings was acquitted. Congress has subsequently impeached, convicted, and removed three of these judges, including Alcee Hastings (who has since been elected to Congress). Robert Collins resigned in August of 1993, after his appeals were exhausted and impeachment was imminent. *See* United States v. Collins, 972 F.2d 1385 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993); *see also* Joan Biskupic, *Supreme Court Order Opens Way for Possible Impeachment of Judge*, WASH. POST, Apr. 6, 1993, at A4 (discussing Collins's case and history of impeachments).

[20] *See* Gerald Stern, *What Claiborne Did*, N.Y. TIMES, Oct. 20, 1986, at A27.

Similarly, Judge Robert Collins, who has been in prison since 1991, continued to draw his annual salary until his resignation in August of 1993.[21] The last time Congress actually impeached a federal judge prior to the 1980s was in 1936, when Judge Halsted Ritter of Florida was removed.[22] Congress has seen its hand forced for the first time in fifty years.

Overwhelmed by these recent rapid-fire prosecutions and impeachment proceedings against federal judges—actions that contemporary commentators perceive as the result of an unprecedented surge in judicial misconduct—Congress sought guidance on how to deal with the potential increase in investigations and removals of federal judges that these prosecutions might bring.[23] In point of fact, however, very little is known about how these recent prosecutions fit into the overall history of the federal judiciary. There is much anecdote and tradition about the nature of the federal judiciary and the people who have served as its judges, but what reliable information exists is scattered among many different sources. The purpose of this study is to explore some of those sources and cast light on the historical behavior of federal judges. I have drawn my conclusions from both aggregated behavior of federal judges as well as from the actions and claims of individual judges. I have given particular attention to why federal judges have left the bench. Where the cause is not clear, the study indicates the reasons that judges have offered for their departures, although at times these may have been misleading or incomplete. This information will help clarify whether the recent prosecutions are in fact a symptom of alarming changes in judicial behavior.

This study focuses on the 190 judges who, over the last 200 years, resigned from the bench for stated reasons other than age or health.[24] Because the number of judges who were actually im-

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[21] *See* Biskupic, *supra* note 19, at A4; John McQuaid, *Collins Resigns Federal Judgeship*, NEW ORLEANS TIMES-PICAYUNE, Aug. 7, 1993, at B1.

[22] *See* Biskupic, *supra* note 19, at A4.

[23] *See* National Commission on Judicial Discipline and Removal Act, Pub. L. No. 101-650, § 409, 104 Stat. 5124, 5124 (1990) (establishing a commission to study the issues involved in the discipline and removal of an Article III judge); Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765, 765 (1989); Mary Jacoby, *Brooks Awaits O.K. As House Braces for First Impeachment Proceedings Since Hastings*, ROLL CALL, June 28, 1992; Russell Ryan, *Better Ways to Dump Bum Judges?*, WASH. TIMES, Jan. 2, 1990, at D3.

[24] Much of the biographical information included in this study is distilled from data collected by the Federal Judicial History Office (FJHO) on all Article III judges who could be identified as resigning from office or retiring between 1869 (when

peached by Congress is quite small,[25] a broader look at all Article III judges who have left the bench, and the reasons why they have done so, may yield more reliable information about judicial behavior. Some attention is also paid to judges who resigned or retired for reasons of age or health before 1919, when "retirement from regular active service" was first offered as an option to Article III judges. This study also addresses the relationship between resignation, malfeasance, and threats of different kinds of punishment. The history of other aspects of judicial tenure that may be salient to the question of how to ensure the high quality and integrity of the federal judiciary, such as the effects of changes in provisions for retirement and disability, and the historical factors surrounding resignations of judges for employment-related reasons are considered also.

Part I of this study begins with a summary of the two centuries of growth of the federal Article III judiciary, from the nineteen judgeships created by the Judiciary Act of 1789[26] to the 829 judgeships that were authorized by Congress by the close of this study. This Part offers a picture of the changing contours of the judiciary as an institution and provides a context for evaluating the changing numbers of judicial resignations. An overview of the numbers of judicial resignations for the last two centuries includes an analysis of these numbers and how they have changed over time. It briefly explores the major categories of resignations and examines in some detail the underlying pattern of judges resigning from office to pursue other employment. This overview sets the stage for Part II, which explores the most salient issues raised by these numbers.

Part II explores the relationship between judicial accountability and judicial independence by taking a close look at not only the most well known incidents of alleged judicial misbehavior leading to congressional investigations, but also at the less well known instances of Justice Department investigations and local prosecutions.

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retirement became an option) and 1919 (when retiring "from regular active service" became an option). As of this writing, there is no comprehensive, accurate listing of judges who retired, "retired from the office," took disability retirement, or were "involuntarily" certified as disabled that would allow distinguishing between these categories. Thus, it is not possible at this time to assess change over time in either the numbers of judges entering these categories or their reasons for doing so. Therefore, treatment of retired judges, of whatever stripe, will be limited to an impressionistic discussion.

[25] *See supra* note 14 and accompanying text.

[26] Act of Sept. 24, 1789, ch. 20, §§ 1-3, 1 Stat. 73.

Part II also discusses the effects on judicial resignation of threats to use all of these mechanisms. The implications of these approaches on judicial accountability and judicial independence and their influence on judicial behavior are suggested. Finally, Part III summarizes the legislative provisions for retirement and disability and considers their impact on the problem of the incompetent judge.

I. OVERVIEW

A. *The Growth of the Federal Judiciary*

The size of the American judiciary has changed dramatically over the past 200 years in response to three major factors: (1) geographical and population growth, (2) commercial growth, and (3) changes in federal jurisdiction. As the country expanded westward and territories were organized and became states, Congress added corresponding district courts to accommodate the needs of these new states.[27] In addition, as population grew through acquisition of territory, natural increase, and immigration, consequent pressures on the federal courts demanded an expanded judiciary.[28] Finally, beginning in earnest after the Civil War, congressional legislation as well as judicial activism in such areas as administration of civil-rights remedies have placed significant burdens on the federal bench.[29] Congress and the President have

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[27] *See* RUSSELL R. WHEELER & CYNTHIA HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM 14 (1989) (recounting the history of the growth of the judicial system resulting from the growth of the country).

[28] *See id.*

[29] William M. Wiecek has identified four ways in which the federal courts' jurisdiction, and thus workload, increased in the years following the Civil War. *See* William M. Wiecek, *The Reconstruction of Federal Judicial Power, in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 237 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988). These were: (1) newly conferred removal powers; (2) the creation of the Court of Claims to handle cases against the federal government; (3) the passage of a bankruptcy act that shifted much of the insolvency-related business of state courts to federal courts; and (4) the conferral of general federal question jurisdiction on the lower federal courts. *See id.*; *see also* Act of Mar. 3, 1875, ch. 137, pt. 3, 18 Stat. 470, 470 (creating federal question jurisdiction). Prohibition was responsible for an enormous increase in judicial workload in the 1920s and 1930s, an increase that at least some judges seemed to relish. *See, e.g.*, *17 Brooklyn Cafes Closed in a Day*, N.Y. TIMES, Aug. 1, 1924, at 1 (reporting Judge Campbell's order closing the largest number of saloons in Brooklyn in one day since Prohibition went into effect); *32 Dry Padlocks in a Day Set Record*, N.Y. TIMES, Aug. 8, 1924, at 28 (reporting a record set by Judge Edwin Garvin for the number of "padlock injunctions" issued in one day,

responded with many minor and several major expansions of the judicial work force in this century.

In 1789, the first Congress created nineteen Article III judgeships.[30] Six men sat on the Supreme Court and rode circuit as trial and appellate judges; Congress allotted the remaining thirteen judgeships to district courts, one for each state, plus one each for the districts of Maine and Kentucky, then parts of Massachusetts and Virginia respectively.[31] Over the next seventy years the number of Supreme Court Justices grew to nine, where, with the exception of five years in the 1860s, it has remained ever since.[32]

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and indicating that a total of 750 were anticipated for the year). The Fourteenth Amendment brought a "steady torrent" of cases before the Supreme Court following upon the heels of the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). In addition, legislation regulating "Big Business" and policing social welfare began in earnest after the turn of the century. Frankfurter and Landis note that "[w]ith differences of emphasis and detail, the path of regulation entered upon by [Theodore] Roosevelt has persisted to this day, and has been trodden by every succeeding President." FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 105 (1927). It is not hard to guess what they might have said about the quantity of regulatory legislation adopted in the ensuing 65 years.

[30] *See* Act of Sept. 24, 1789, ch. 20, §§ 1-3, 1 Stat. 73, 73-74.

[31] The number of judgeships cited in this Section and used as the basis for statistical calculations throughout are from an internal report by the Administrative Office of the U.S. Courts, Statistics Division, on the number of authorized judgeships from 1789-1990. *See* Statistics Div., Administrative Office of the U.S. Courts, History of the Authorization of Federal Judgeships Including Procedures and Standards Used in Conducting Judgeship Surveys (1991) [hereinafter AOUSC Report]. These numbers are for Article III judgeships and include the Supreme Court, the circuit courts of appeals (including the U.S. Court of Appeals for the Federal Circuit, established in 1982), the Supreme Court of the District of Columbia (1863-1935), the Court of Customs and Patent Appeals (1958-1981), the Court of Claims (1855-1981), and the Court of International Trade (1956-1990). Another source for similar, although not equivalent, information is RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM tbl. B.3, at 353-57 (1985). From 1882 on, it is possible to compile the number of judges in active service from listings in each volume of the Federal Reporters, which West began publishing in 1882. Although it would have been preferable to use the number of judges rather than judgeships in this report, to date there has been no accurate compilation of the number of judges sitting per year for the years prior to 1882. Thus, in order to maintain consistency in statistical analysis, judgeships were used throughout.

[32] Congress increased the size of the Supreme Court for the first time in 1807 with the addition of an Associate Justice, creating a seven-person court. *See* Act of Feb. 24, 1807, ch.16, § 5, 2 Stat. 420, 421. In 1837, the number of Justices was increased from seven to nine. *See* Act of March 3, 1837, ch. 4, § 1, 5 Stat. 176, 176. In 1863, Congress brought the number of Justices to 10. *See* Act of March 3, 1863, ch. 100, § 1, 12 Stat. 794, 794. The death of Judge Catron in 1865 reduced the number of judges to nine; Congress then passed the Act of July 23, 1866, ch. 210, 14 Stat. 209, denying the President any further appointments to the court until after the

During the same period, the growth of the country to thirty-three states brought a concomitant increase in the number of district court judgeships to a total, in 1860, of forty-three.[33] In 1855, Congress created the first circuit judgeship to deal with the large number of land disputes in California.[34] By 1860, on the eve of the Civil War, a total of fifty-five U.S. judgeships provided for "good behavior" tenure.[35] By 1900, the number of Article III judgeships had reached 113.[36] Thus, over the course of 100 years, the judiciary had grown by nearly 500%. After 1900, the judiciary continued to grow at an exponential rate, doubling in size over the next three decades.[37] By 1970, it had doubled again, to 521 judgeships. During the 1980s, Congress added 157 new judgeships (see Figure 1). In 1990, the number of Article III judgeships stood at 829, double the number of only twenty-five years before.[38]

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next vacancy, which occurred when Justice Wayne died in July of 1867. *See id.* The court was finally set at its current size by the Act of April 10, 1869, ch. 22, §1, 16 Stat. 44.

[33] *See* AOUSC Report, *supra* note 31, tbl. 7.

[34] *See* WHEELER & HARRISON, *supra* note 27, at 14.

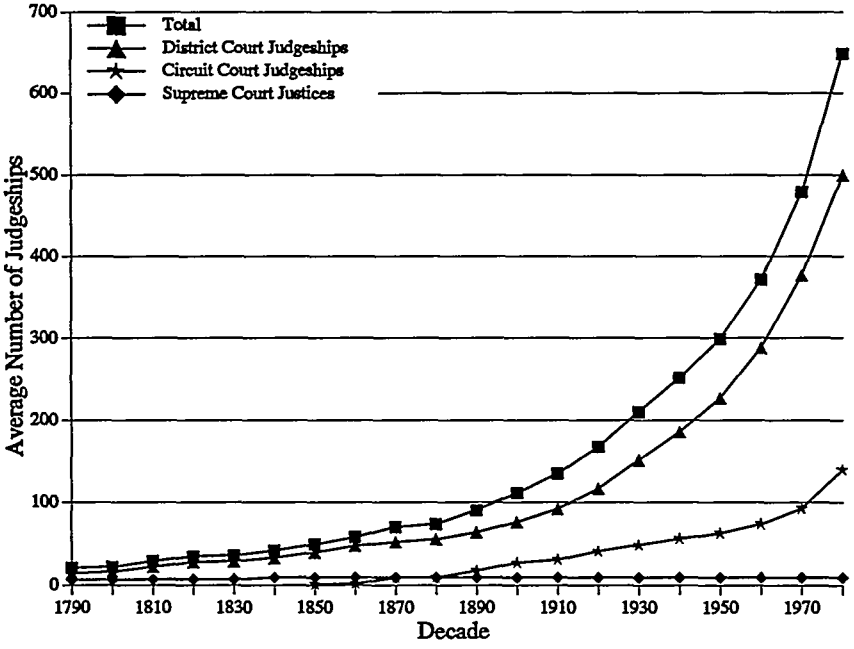
[35] *See* AOUSC Report, *supra* note 31, tbl. 7.

[36] *See id.*

[37] Congress passed omnibus judgeship bills in 1922, 1935, and 1938. *See* Act of Sept. 14, 1922, ch. 306, § 1, 42 Stat. 837, 837-38 (adding 24 district judgeships); Act of Aug. 19, 1935, ch. 558, § 1, 49 Stat. 659, 659 (authorizing 14 additional judgeships); Act of May 31, 1938, ch. 290, § 1, 52 Stat. 584, 584-85 (adding four circuit judgeships and 12 district judgeships).

[38] *See* AOUSC Report, *supra* note 31, tbl. 7.

FIGURE 1
The Growth of the Federal Judiciary
1789-1989



In recent years, both judges and scholars have expressed concern about the effects the growth of the judiciary may have on the appeal of the job and the behavior of judges.[39] For instance, one theory holds that the larger the size of the judiciary, the lower the prestige of the job, and thus the lower the quality of people willing to serve.[40] However, this concern appears to be, if not

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[39] *See, e.g.*, Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 762-67 (1989) (arguing that growth of federal caseload threatens the quality of federal judges, quality of their work, and the overall functioning of federal court system); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 764 (1983) (expressing concern about reduction in quality of federal appellate rulings due to increasing number of appeals).

[40] *See, e.g.*, FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 6-8 (1990); GORDON BERMANT ET AL., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS 30-

belied by the history of judicial resignations,[41] at least in need of qualification in deference to other factors that make the equation more complex. Similarly, the theory that holds that an increase in the size of the judiciary will result in a decrease in collegiality and peer pressure, leading to more questionable behavior on the part of judges, requires close empirical study.[42]

B. *Changes in Judicial Tenure*

Whether or not the size of the judiciary can be said to affect the *nature* of judicial tenure—specifically, the appeal and quality of the office—it clearly must affect any assessment of whether and how *tenure itself*—the length of time in office and the reasons for leaving—has changed over time. Because the judiciary has historically numbered relatively few people, it is not surprising that the absolute number leaving office has been correspondingly small. Resignations occur infrequently (averaging only slightly more than one per year until the 1970s), so that discovering a pattern or even discerning change over time is difficult. But if numbers of resignations are considered as a percentage of the total Article III judiciary at a given point in time, some patterns begin to emerge.

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31 (1993). Richard Posner noted in 1985 that "an increase in the number of judges could reduce the prestige of the individual judge, and prestige is an important form of nonpecuniary compensation for federal judges. It is unlikely, however, that any substantial reduction in prestige has yet occurred." POSNER, *supra* note 31, at 36.

[41] As is discussed in the next Section, the highest percentage of resignations in U.S. history occurred during the decade when our judiciary was smallest. *See infra* part I.B.1. Excluding the resignations that occurred during the secession of the South before the Civil War, the next highest percentage of resignations occurred during the 1820s and 1910s, decades when the judiciary was only a fraction of its current size. *See infra* part I.B.1. This suggests that even if a small judiciary is desirable, it is not necessarily correlated with the promotion of "prestige."

Nonetheless, theories related to judicial size deserve closer scrutiny, though they are beyond the scope of this study. For example, does the fact that the judiciary is so big result in more dissatisfaction with the office, measured by resignations to take other jobs? Does a higher proportion of potential candidates for judgeships decline nomination now than in the past? If so, is it because the size of the federal judiciary diminishes its "elite" status? Does greater size mean more investigations into allegations of judicial misbehavior? Such questions must be addressed with more than impressionistic or anecdotal studies.

[42] *See, e.g.*, Charles G. Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 305-06 (1993).

1. Judicial Resignations As a Percentage of the Total Judiciary: Change over Time[43]

Between 1789 and 1992, 2627 men and women served as federal judges.[44] Of those, 190 left the bench citing reasons other than health or age. Thus, over the course of U.S. history, only 7% of all Article III judges have resigned from the bench for reasons other than health or age. With the exception of this one group, the resignation rates per decade were determined by calculating the average number of judgeships per decade (not per year), and dividing that number into the total number of resignations for the entire decade.[45] These figures do not include senior judges. Examined by decade, the percentage of judges leaving the bench has fluctuated over the years, but has declined since 1910 as the size of the judiciary has increased.

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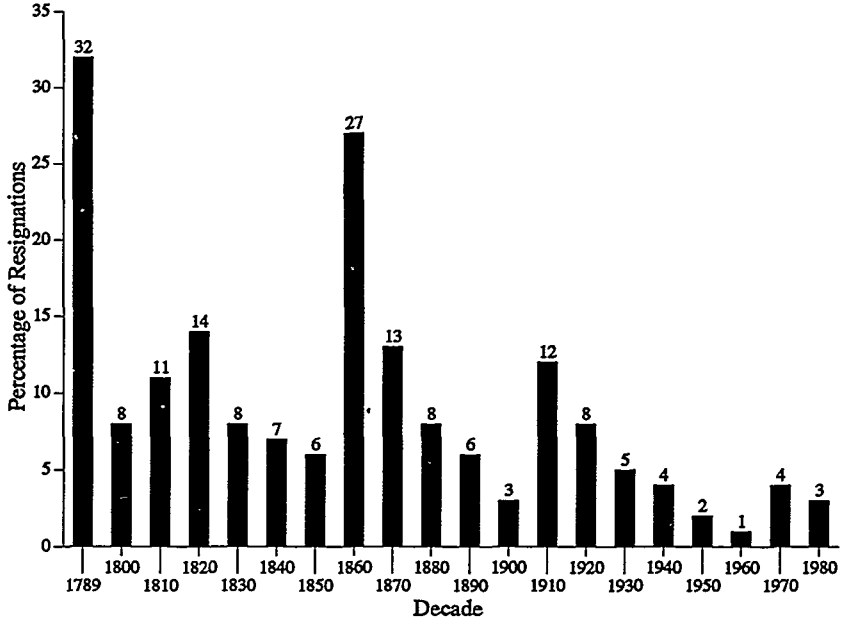
[43] The Appendix to this Article contains a list of all federal judges categorized by decade of tenure (table 1) and reason for termination (table 2). *See infra* app., tbl. 1. All observations made within this Part rely on these tables.

[44] This number was calculated by counting the number of appointments per President. *See Index by Appointing President, in* THE BICENTENNIAL COMM. OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, JUDGES OF THE UNITED STATES 563-65 (1983) (providing information on U.S. Presidents from Washington through Carter); AOUSC Report, *supra* note 31, app. (providing information for Presidents Reagan and Bush).

[45] When referring to the average size of the judiciary in a decade, the reference is to the average judgeships, and not to the total number of individual judges who served over the course of the decade. *See supra* note 31 (explaining why judgeships were used instead of judges). As the goal in creating the resignation rates was to assess change over time, it was thought that, applied consistently, the method employed would yield numbers allowing comparison by decade. These rates will *not*, however, compare with rates based on a ratio of numbers of resignations to numbers of judges sitting in any given year.

FIGURE 2
Percentage of Judges Resigning for Reasons Other than Age or Health



The highest departure rate for reasons other than health or age (32%) occurred during the decade when the judiciary was at its smallest: 1789–1799. The average number of judgeships per year during this decade was twenty-two. In all, ten judges resigned during those years. Three judges left citing reasons of health or age, three were elected or appointed to other offices, and four left to resume private practice (one explicitly citing inadequate salary as his reason for doing so).[46] Four of the ten resignations came from Supreme Court Justices, whose circuit-riding duties made the office too physically demanding for some.[47] The first Chief Justice, John

[46] *See infra* app., tbl. 1.

[47] In the early years of the federal judiciary, the pay was low, the work was sparse,

Jay, resigned to become Governor of New York.[48] When he was reappointed to the position of Chief Justice by John Adams in 1800, he returned his commission, explaining to the President:

> I left the Bench perfectly convinced that under a System so defective, it would not obtain the Energy weight and Dignity which are essential to its affording due support to the national Govern[ment]; nor acquire the public Confidence and Respect, which, as the last Resort of the Justice of the nation, it should possess. Hence I am induced to doubt both the Propriety and Expediency of my returning to the Bench under the present System . . . .[49]

Jay observed that, given the circuit-riding requirements of the office, "independent of other Considerations, the State of my Health removes every Doubt—it being clearly and decidedly incompetent to the fatigues incident to the office."[50] Jay's refusal to accept his commission opened the way for the appointment of John Marshall to lead the Court.[51] Thus circuit riding, the aspect of Supreme Court service that generated the most dissatisfaction among justices over the first century of the federal judiciary, was indirectly responsible for the appointment of the man whose leadership of the Supreme Court would be among the most important factors in elevating the stature of the office from its unappealing status in the first decade of the Republic. During Marshall's tenure, only two justices resigned from the Court, and both left for health reasons.[52]

The next highest percentage of departing judges occurred in the 1860s. The 22% departure rate can be accounted for almost entirely by the fifteen judges who resigned (and the one who was impeached) as a consequence of their Confederate service or

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and the physical requirements involved with holding court were quite onerous. *See* Maeva Marcus & Emily F. Van Tassel, *Judges and Legislators in the New Federal System, 1789–1800, in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY (Robert Katzmann ed., 1988) (discussing the burdens of court duty in the first decade of the Republic).

[48] ELDER WITT, CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 800 (2d ed. 1990).

[49] Letter from John Jay to John Adams (Jan. 2, 1801), *in* 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 147 (Maeva Marcus & James R. Perry eds., 1985) [hereinafter DOCUMENTARY HISTORY OF THE SUPREME COURT, 1789-1800].

[50] *Id.*; *see also* Marcus & Van Tassel, *supra* note 47.

[51] Chief Justice Marshall was appointed by President John Adams in 1801 and served until his death on July 6, 1835. *See* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 286, 797 (1922).

[52] These were Justices Alfred Moore and Gabriel Duvall. *See* 1 *id.* at 174-75.

sympathies.[53] Judge James Hughes returned to private practice because he found life on the Court of Claims "too tame."[54] The other nine resignations unrelated to the Civil War all were due to old age or poor health. Of the ten judges who left the bench for reasons other than health or age in the 1870s, five did so under the cloud of congressional investigation.[55]

The highest departure rate in the twentieth century occurred when roughly 12% of the federal judiciary left the bench in the decade between 1910 and 1920. In 1911, salaries for Supreme Court justices went up by $2000, following a recent increase of $1000 in district and circuit judge salaries.[56] Between 1911 and the next judicial salary increase in 1926, however, real wages eroded by approximately 55% for Supreme Court justices, 67% for circuit court judges, and 69% for district court judges.[57] Of the eighteen judges that resigned during the decade, thirteen left to take other employment, and three of those thirteen explicitly cited the inadequate salary of their office as their reason for stepping down. Five others departed from the bench after allegations of misbehavior were made against them.[58]

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[53] *See infra* app., tbl. 1. One of these judges, Henry Boyce of the Western District of Louisiana, left the bench in January of 1861. Reports of his departure conflict; however, given the date and place, it is reasonable to suspect motivations related to the secession of the South.

[54] 1 MARION T. BENNETT, THE UNITED STATES COURT OF CLAIMS: A HISTORY 23 (1976).

[55] Charles Taylor Sherman (D. Ohio) resigned in 1873 after corruption charges were leveled against him in the House of Representatives. *See* 3 HINDS' PRECEDENTS, *supra* note 14, ch. 79, § 2511, at 1019 (describing House investigation into conduct of Sherman). Mark W. Delahay (D. Kan.) resigned sometime after he was impeached in 1873 but before being tried by the Senate. *See id.* §§ 2504-05, at 1009-10 (discussing investigation of Delahay). Richard Busteed (D. Ala.) resigned while under congressional investigation for impeachment charges of nonresidence. *See id.* § 2512, at 1020-21 (discussing investigation of Busteed). Edward Henry Durell (D. La.) resigned in 1875 after a House committee recommended his impeachment for "bankruptcy irregularities." *See id.* §§ 2506-09, at 1012-15 (discussing investigation of Durell). William Story (W.D. Ark.) resigned after appearing before a House committee with "lame and disconnected" testimony about inordinately large expenditures he had approved for his court. *See The Daily Gazette*, ARK. GAZETTE, June 9, 1874, at 3; *see also infra* text accompanying notes 122-27 (describing investigation and subsequent resignation of Story).

[56] Calculations are based on salary figures, in current dollars and in 1983 dollars, published in POSNER, *supra* note 31, app. B (providing salaries of federal judges in 1983 dollars from 1800 to 1983).

[57] *See id.* at 348.

[58] One of those accused was Judge Archbald, who was removed through the impeachment process. *See* BUSHNELL, *supra* note 8, at 217-42 (discussing misdeeds,

The resignation rate steadily declined from 8% in the 1920s to 4% in the 1940s. The lowest departure rates in the history of the judiciary occurred during the 1950s (2%) and 1960s (1%). The departure rate then grew to just over 3.6% for the decade between 1970 and 1980 and dropped marginally in the 1980s to 3.5%. Although the absolute number of departures in the 1980s was large—thirty judges resigned—the rate of departure was actually lower than it had been in all but three other decades in the history of the federal judiciary.[59]

What is most striking about the resignation rate of federal judges is the fact that it has fluctuated only slightly since the 1940s, contrary to the belief of many observers, including a recent Chief Justice.[60] If large size and low salary are having an adverse impact on the prestige of the federal judiciary, and thus on the desire of people to serve, the negative effects of these circumstances have yet to be reflected by large-scale resignations. The effect may be occurring at the other end of the process, as evidenced by increasing declinations to serve.[61]

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impeachment, and conviction of Archibald). The other departing judges were Judge Peter Grosscup, Judge Cornelius Hanford, Judge Daniel Thew Wright, and Judge John Augustine Marshall. *See* 6 CANNON'S PRECEDENTS, *supra* note 14, ch. 202, § 526, at 745 (discussing impeachment proceedings against Hanford); *id.* § 528, at 751 (discussing investigation of Wright); *infra* text accompanying note 120 (discussing Marshall's resignation to avoid scandal); *infra* text accompanying note 244 (discussing resignation of Grosscup). Jacobus ten Broeck, in his study of the five impeachments from 1903 to 1936, identifies another judge in that decade—Judge Samuel Alschuler—as resigning within the year during which the House began investigating him. *See* Jacobus ten Broeck, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 MINN. L. REV. 185, 185 n.3 (1939). It is clear that Alschuler's retirement was not connected to allegations of misbehavior. *See infra* text accompanying notes 116-19 (discussing exoneration of Alschuler by the House).

[59] This number does not include the judges who "retired from the office" under some form of what is codified under 28 U.S.C. § 371(a) (1988). An additional fourteen judges "resigned" under this provision once they were eligible for their pensions under the age and service requirements. For a discussion of these "retirements from office," see *infra* notes 308-11 and accompanying text.

[60] *See* THE IN-AND-OUTERS: PRESIDENTIAL APPOINTEES AND TRANSIENT GOVERNMENT IN WASHINGTON 135 (G. Calvin MacKenzie ed., 1987) (quoting a letter from Chief Justice Warren Burger to Presidential Press Secretary Nicholas F. Brady); Charles Mohr, *Washington Talk: Congress; Forget the Deficit; A Crisis Is Looming: Raises*, N.Y. TIMES, Dec. 9, 1988, at B8 (noting that Warren Burger told the Quadrennial Commission that "more judges left the bench in his tenure as Chief Judge 'than from the beginning of the Constitution in 1789 up to 1969'").

[61] Former White House Counsel Fred Fielding, who screened judicial candidates for five years during the Reagan administration, has indicated that many qualified lawyers quickly removed themselves from consideration on the basis of the low salary. *See* Bill McAllister, *The Judiciary's "Quiet Crisis": Prestige Doesn't Pay the Tuition*, WASH.

2. Why Judges Resign

The specific reasons judges have given[62] for their resignations cover a broad range and sometimes have multiple components. As Figure 3 illustrates, these reasons range from the relatively common (poor health or low salary) to the unique (the case of Judge Mahlon Dickerson, who resigned so that his brother might be appointed in his place).[63]

POST, Jan. 21, 1987, at A19. Determining whether declinations have increased over time, and for what reason, would require research not only in presidential papers and Department of Justice files, but also in the papers of the individual senators who were in office when judicial vacancies occurred in their states. If more potential judicial candidates removed themselves from consideration during the 1980s, their withdrawal could be attributed to the nature of the pool of lawyers from which the Reagan administration selected. Of Ronald Reagan's 372 appointments to the Article III bench, a higher proportion were recruited from large law firms (firms with 25 to more than 100 partners and associates) than had been the case with any of the previous four administrations. *See* Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 321, 325 (1989). Over 40% of his district court appointees and over 50% of his appellate court appointees had a net worth of over half a million dollars. *See id.* at 321, tbl. 1, 324, tbl. 3.

[62] I speak of "reasons" for resignation throughout this Article for the sake of convenience, but it might be more accurate to say "reasons judges have offered for resigning, or what they have done after they resigned." There is such thing as an overqualification, however.

[63] For a detailed account of the machinations leading to Dickerson's appointment and subsequent resignation six months later, see KERMIT L. HALL, THE POLITICS OF JUSTICE: LOWER FEDERAL JUDICIAL SELECTION AND THE SECOND PARTY SYSTEM, 1829-1861, at 34-35 (1979).

FIGURE 3
Reasons for Resignation, 1789-1992

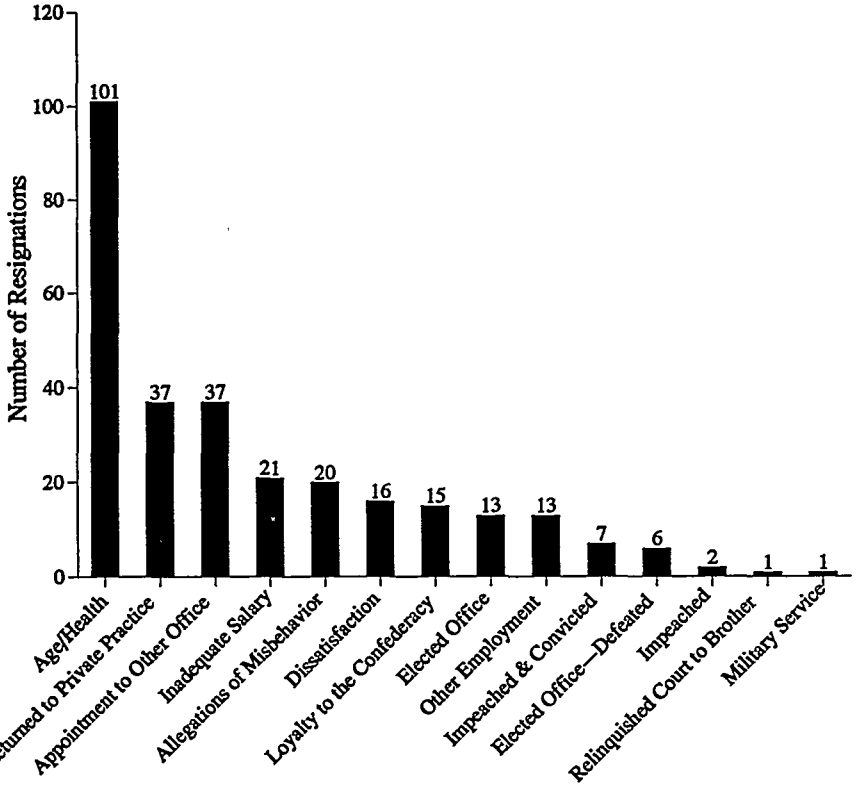

Table 2 of the Appendix lists the seventeen groupings that I used to analyze judicial resignations, along with the names of the judges included in those groupings.[64] For the purposes of this Article, however, reasons cited for resignation can be grouped into five

[64] Some of the categories used in the Appendix have the potential for overlap. For example, virtually all of the "inadequate salary" resignations could be subsumed in the "returned to private practice" category; similarly, many of the "returned to private practice" resignations may have been due to inadequate salary. It is also clear that some judges had multiple reasons for resigning. Nevertheless, I have assigned each judge to a single category (as listed in Table 2), and have broken out narrower categories from the general where those specific reasons seemed likely to be of interest to other researchers (or where I was unable to fit a single judge into a general category, as with Mahlon Dickerson, for example). For the discussion in this Article, I have brought these categories back together.

major categories: (1) age and/or health; (2) appointment to other office or pursuit of elected office; (3) dissatisfaction; (4) return to private practice, other employment, inadequate salary; and (5) allegations of misbehavior (including impeachments and convictions). Each of these will be discussed in turn.

a. *Age and/or Health (Including Disability and Pre-1919 Retirement)*

Not surprisingly, judges have offered the pressures of advanced age or poor health as their primary reasons for resignation. During most of the nineteenth century, Congress provided no incentive for aging or incapacitated judges to leave the bench;[65] as a consequence, many judges remained in office after they were no longer able to carry out their duties. On the other hand, many other judges chose to relinquish their lifetime salary once it became clear to them that they could no longer execute the duties attached to the salary. This issue is discussed separately in Part III, covering retirement and disability.

b. *Appointment to Other Office or Pursuit of Elected Office*

Resignations to accept appointments to other offices or to run for (or accept) elected office have occurred regularly since the first decade of the Republic, following in the tradition set by John Jay and John Rutledge.[66] Although such appointments have a long history, their occurrence has been relatively infrequent until recently. Throughout the nineteenth century, the President did not often look to the federal judiciary as a source for other government appointments.[67] In recent years, however, Presidents have selected federal judges to serve as director of the Federal Bureau of

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[65] The legislative responses to age and incapacity are discussed in some detail *infra* part III.

[66] John Rutledge was the first federal judge to resign, leaving the Supreme Court in 1791 to accept a judicial position in South Carolina. *See* WITT, *supra* note 48, at 801. John Jay left four years later to become governor of New York. *See id.* at 800.

[67] Over the course of the nineteenth century only 12 judges resigned to accept appointment to other offices, compared with 27 between 1900 and 1992. *See infra* app., tbl. 2. Of the 12 nineteenth-century resignations, only nine were to accept presidential appointments. *See* VAN TASSEL, *supra* note 14, at app. (describing the appointments of Judges Powhatan Ellis, John Young Mason, Alfred Conkling, George Purnell Fisher, John C. Davis, William Henry Hunt, Walter Quintin Gresham, and Henry Blodgett). Judge Gresham counts for two resignations, having resigned a district judgeship to become U.S. Postmaster General under Chester A. Arthur, and a Seventh Circuit judgeship to become Grover Cleveland's Secretary of State. *See id.*

Investigation (FBI) three times;[68] other appointments have included an Ambassador to the United Nations,[69] two Solicitors General,[70] and a Secretary of Education.[71]

c. *Dissatisfaction*

"Dissatisfaction" is something of a catch-all category. The reasons for a judge's inclusion here range from resignations attributed to real, generalized unhappiness with systemic or institutional factors associated with judging, to a desire of the resigning judge to move on to other endeavors. In the latter case, the resigning judge has sometimes specifically stated that it was not dissatisfaction with the office, but the incompatibility of a federal judgeship with personal goals.[72] Such judges are included under the heading of dissatisfaction because their resignations indicate a desire to do something other than judging.[73]

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[68] President Carter appointed Eighth Circuit Judge William Webster as FBI director in 1978, and he served until 1987. *See* Philip Shenon, *The Reagan White House: Man in the News; Webster of F.B.I. Named by Reagan As C.I.A. Director*, N.Y. TIMES, Mar. 4, 1987, at A1 (discussing Webster's career, including his appointment as FBI Director in 1978). In 1987, President Bush appointed Judge William Sessions of the Western District of Texas to succeed Webster. *See* Oswald Johnson et al., *Reagan Names "Tough Judge" As FBI Director*, L.A. TIMES, July 25, 1987, at 1 (discussing Sessions's appointment). President Clinton recently appointed yet another federal judge to the FBI post: Judge Louis Freeh of the Southern District of New York. *See* Paul Bedard & Michael Hedges, *FBI Nominee Gets Praise from Many Quarters*, WASH. TIMES, July 21, 1993, at A3 (discussing Freeh's appointment).

[69] Justice Arthur Goldberg resigned from the Supreme Court in 1965 to accept Lyndon Johnson's appointment to the United Nations. *See* Henry J. Reske, *Justice Goldberg Reflects on Remarkable Career*, L.A. TIMES, Dec. 7, 1986, at 4 (noting Goldberg's resignation in 1965 to become United Nations ambassador).

[70] Judge Kenneth Starr was appointed Solicitor General by George Bush in 1989. *See* Maralee Schwartz et al., *The New Regime: Starr Selected for Solicitor General*, WASH. POST, Feb. 2, 1989, at A23. Previously, Jimmy Carter had appointed Sixth Circuit Judge Wade McCree to that office in 1977. *See* Eric Pace, *Wade H. McCree Jr. Dies at 67; Was Judge and Solicitor General*, N.Y. TIMES, Sept. 1, 1987, at B6.

[71] Ninth Circuit Judge Shirley Hufstedler resigned her judgeship to become the first secretary of the new Department of Education under Jimmy Carter. *See* Phyllis Theroux, *The Judge Goes to Washington*, N.Y. TIMES, June 8, 1980, § 6 (Magazine), at 41 (discussing Hufstedlers's career, including her appointment as Secretary of Education in 1980).

[72] Judge James B. Miller, Jr., resigned from the U.S. District Court for the District of Maryland in 1986 "in order to pursue other interests." Letter from Judge James R. Miller, Jr., to President Ronald Reagan (May 7, 1986) (on file with the AOUSC, Human Resources Division).

[73] Virtually every resignation could, in some sense, be attributed to "dissatisfaction" of one sort or another. As the following discussion indicates, however, it is useful to separate out resignations that indicate either a stated dissatisfaction with

Nevertheless, there are judges who have left office for reasons relating to specific aspects of the office. Judges who have left because of institutional dissatisfaction in recent years include Judge Robert Bork, who, after his failed nomination to the Supreme Court, stated his wish for a more open forum than the federal bench provides from which to comment on the state of the judiciary,[74] and Judge J. Lawrence Irving, who resigned in protest over what he concluded to be the excessive harshness of the new federal sentencing guidelines,[75] stating: "'If I remain on the bench I have no choice but to follow the law . . . . I just can't, in good conscience, continue to do this.'"[76] Judge Griffin Bell returned to private practice a few months before President Jimmy Carter appointed him to the office of Attorney General, saying of the Fifth Circuit, "the work had become dreary, given the heavy load of criminal and habeas corpus matters."[77] Earlier in the twentieth century, Justice John Hessin Clarke, with a touch of racism that is ironic considering his idealistic reason for resigning (he left the bench to "promote American participation in the League of Nations"), informed President Harding that he would "die happier" working for world peace than he would if he continued spending his time "determining whether a drunken Indian had been deprived of his land before he died or whether the digging of a ditch was constitutional or not."[78]

Although the judges who resign because of dissatisfaction often have little in common, the unifying thread running through many of their reasons for resignation is a sense of restrictiveness in the office of judge. This discomfort speaks more to a chafing at the

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specific aspects of the office or a general statement that the person and the office do not fit each other.

[74] In his letter of resignation to President Reagan, Judge Bork stated that

> the crux of the matter is that I wish to speak, write, and teach about law and other issues of public policy more extensively and more freely than is possible in my present position . . . . Constraints of propriety and seemliness limit the topics a federal judge may address and the public positions he may advocate.

Letter from Judge Robert Bork to President Ronald Reagan (Jan. 7, 1988) (files of the AOUSC, Human Resources Division).

[75] *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 3E1.1 (1992).

[76] *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, at 22.

[77] Letter from Judge Griffin Bell to Judge Irving R. Kaufman (July 16, 1980) (appended to a memorandum from Joseph Spaniol, Jr., to Alfred Zuck (Nov. 12, 1980) (on file with the AOUSC, Human Resources Division)).

[78] WITT, *supra* note 48, at 854.

requirements of exhibiting "judicial temperament" on the part of individual judges than to a need for any particular institutional change in the office. To the extent that potential nominees can be briefed about the restrictions on lifestyle inherent in judicial service, resignations stemming from a failure to appreciate the full extent of the limitations and frustrations of the office might be lessened by more careful acceptance of the office. "Dissatisfaction" resignations, however, do not seem to raise issues of discipline or removal. They point more directly toward a need for congressional attention to the quality of the office.

d. *Return to Private Practice, Other Employment, Inadequate Salary*

Most judges who have left office for reasons other than age or health have taken other employment immediately after leaving the bench, and many have cited that "other employment" as their reason for leaving the judiciary. In some cases, this category is the most opaque for purposes of determining precisely *why* judges have decided to leave. If judges resign from the bench before being forced to by old age or ill health, it is quite likely that they will subsequently be employed (unless they are independently wealthy). Dissatisfaction with the job, the inadequacy of judicial salaries, and pressures stemming from allegations of misbehavior or incapacity are all reasons that might underlie a decision to leave the bench for other employment. Where possible, such reasons have been separately identified, and the judges have been placed in the appropriately specific category.[79] For the majority of judges taking other employment, however, we are left to speculate about their reasons based on changes in aggregate numbers and historical context.

Over the last 200 years, relatively few judges have explicitly cited low pay as their reason for resignation. For the period studied, only twenty-one judges have actually said as much, but forty-nine additional judges returned to private practice or accepted other employment. Seventy-one judges resigned to engage in other employment, excluding those appointed or elected to other office and those who resigned to run for other office but were defeated. It is reasonable to suppose that in some instances salary was a factor, and in other cases, different considerations came into play. For instance, in 1824, after only five years on the court, forty-seven-

[79] *See supra* note 64.

year-old Theodric Bland, the district judge for Maryland, resigned to accept the office of Chancellor, the highest-paying judicial post in Maryland.[80] He may have taken the post for financial, personal, or status-related reasons. Similarly, Judge Julius Mayer, who left the Second Circuit in 1924 to return to private practice, cited inadequate salary as one reason for his resignation.[81]

Judges have complained about the low salary of the office from the earliest years of the Republic. Nathaniel Pendleton, district judge for Georgia, wrote to President Washington in 1791 expressing his dissatisfaction with the position:

> When I solicited the appointment of Judge of this District, I imagined Congress would have made a more ample provision for their Judges; but having, at my own solicitation had the honor to be nominated by you, I could not with propriety refuse serving: altho it will readily be admitted by those who knew the extant of my practice at the bar, that the salary allowed me, is but a small compensation, nor is it indeed an adequate provision for a family in this Country.[82]

Pendleton stayed on for five more years before resigning in 1796 because the salary was not adequate to educate his children.[83]

In 1857 Justice Benjamin Curtis resigned as a direct result of serious disagreements over the *Dred Scott* case;[84] however, his dissatisfactions with the office were personal as well as legal and political. It was later reported that

> [i]n letters to his friends he stated that his main reason for [resigning] was that the salary was so small,—it was then $6000,—he could not support his family in Washington, without expending, in addition to his salary, his entire private income, and that he did not deem it his duty to do so.[85]

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[80] *See* H.H. WALKER LEWIS & JAMES F. SCHNEIDER, A BICENTENNIAL HISTORY OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND, 1790–1990, at 28 (1990) (noting Bland's appointment); 1 CONWAY W. SAMS & ELIHU S. RILEY, THE BENCH AND BAR OF MARYLAND 268 (1901).

[81] *See Judge Mayer Dies of Heart Attack*, N.Y. TIMES, Dec. 1, 1925, at 1.

[82] Letter from Nathaniel Pendleton to George Washington (Mar. 5, 1791), *in* Marcus & Perry, *supra* note 49, at 722 (footnotes omitted).

[83] *See id.* at 723 n.3.

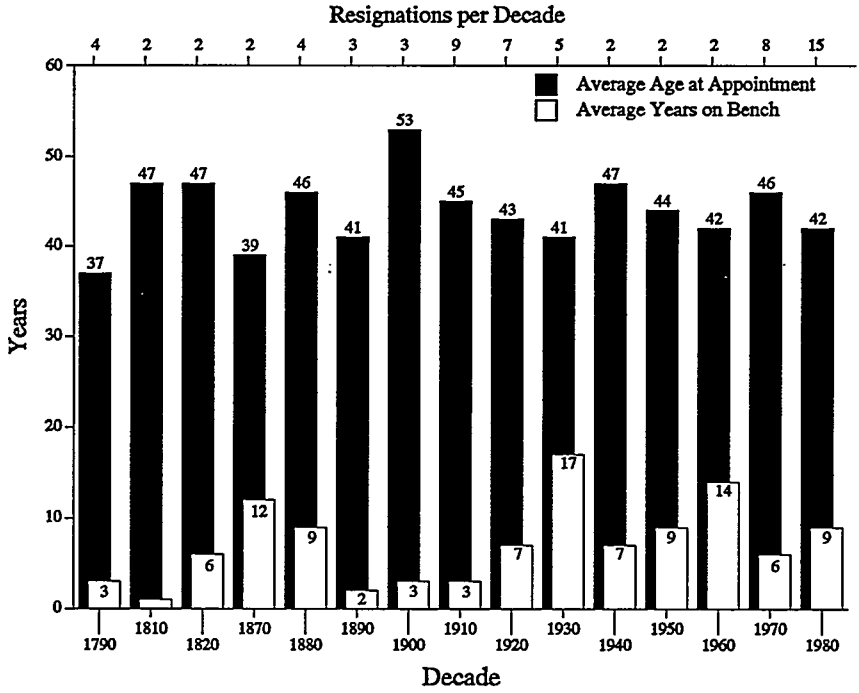
[84] *See* 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1968: THEIR LIVES AND MAJOR OPINIONS 904 (Leon Friedman & Fred L. Israel eds., 1969) (noting that "[d]issension and suspicion over rendering . . . *Dred Scott* opinions provided the catalyst for Curtis to resign from the Supreme Court").

[85] Albert Dickerman, *The Business of the Federal Courts and the Salaries of the Judges*, 24 AM. L. REV. 78, 85 (1890).

It may be that salary alone is not the determinative factor in "other employment" resignations. After all, over the entire period studied, less than 5% of the judiciary resigned to take other positions. However, when the age at appointment and years of service of the "other employment" judges are tabulated, suggestive statistics emerge. The average age at appointment for this group of judges is 45.7, with a median age of forty-two; their average service on the bench is seven years.[86]

FIGURE 4

Average Age at Appointment and Number of Years on Bench for Judges Resigning Under Categories of Inadequate Salary, Other Employment, or Return to Private Practice



[86] *See generally* AOUSC Report, *supra* note 31, app.

Without statistics for the average age at appointment of judges who stay on the bench until retirement or death, no conclusive statements can be made about the import of these numbers.[87] Nevertheless, it may be that judges who are appointed at a relatively young age will be more likely to leave the bench to pursue other endeavors than those who are appointed when they can be expected not only to have amassed more experience, but more financial security as well.[88]

The number of people who have declined to be considered for federal judgeships because of the low salary is undoubtedly far greater than the number resigning from judgeships for that reason. Nonetheless, this number can only be approximated. In the nineteenth century, when some Presidents had a habit of nominating individuals for judgeships without consulting them first, a number of candidates declined nomination or declined to serve after confirmation because of the low salary.[89] For instance, when looking for someone for the newly created judgeship of the Western District of Louisiana, President Taylor had difficulty finding a nominee among his wealthy Whig acquaintances willing to serve on a salary of $2000 a year.[90] His first nominee, James G. Campbell, turned down the nomination (after he learned of it) in favor of his lucrative law practice.[91] Campbell recommended that Taylor appoint in his stead state Circuit Court Judge John Kingsbury Elgee, who, explained Campell, possessed "an ample fortune which will enable him to accept the appointment, for with the salary attached to it, the Judge will have to support the office and not the office the

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[87] Although one study of congressional tenure looked at the tenure of federal judges leaving the bench between 1974 and 1985 and concluded that the average tenure of those judges was 13.5 years, the study did not separate out judges who resigned from those who retired or died in office. *See* Mark Tushnet et al., *Judicial Review and Congressional Tenure: An Observation*, 66 TEX. L. REV. 967, 982-83 (1988). Presumably, the average tenure would increase if judges who resigned were not included.

[88] An article in the *Washington Post* in 1987 (before federal judges received a significant pay raise in 1989) cited many judges as warning that "the practice in the Reagan and Carter administrations of naming younger lawyers to the bench is likely to result in more resignations, as judges who have had little time to accumulate wealth discover the costs of educating their children, a problem Burger said one judge dubbed 'maltuition.'" McAllister, *supra* note 61, at A19.

[89] Judges who were confirmed but declined to serve have not been included in this study except anecdotally.

[90] *See* HALL, *supra* note 63, at 86.

[91] *See id.* at 87 (noting that Campbell "preferred his lucrative law practice and planting to the inadequate federal judicial salary").

Judge."[92] Taylor issued a recess commission to Elgee, who also promptly declined, preferring the lesser travel involved in his better paying state circuit judgeship.[93] President Tyler ran into similar problems when one of his nominees, William Brockenbrough, declined because of the "utter inadequacy of the compensation,"[94] and another, Charles Dewey, turned down the job after confirmation because his salary as Indiana Supreme Court Justice was $1500 higher than the federal judgeship.[95]

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[92] *Id.*

[93] *See id.*

[94] *Id.* at 49.

[95] *See id.* at 52 (noting that the prestige of the state judgeship was also a factor in Dewey's decision).

TABLE 1
Judges Leaving the Bench for Other Employment by Decade

Decade	*Returned to Private Practice*	*Other Employment*	*Inadequate Salary*	*Appointment to Other Office*	*Elected Office*	*Sought Elected Office–Defeated*	*Total*
1789-1799	3	0	1	1	2	0	7
1800-1809	0	0	0	1	0	0	1
1810-1819	0	0	1	0	0	0	1
1820-1829	0	2	0	0	3	0	5
1830-1839	0	0	0	1	1	0	2
1840-1849	0	0	0	1	1	0	2
1850-1859	0	0	0	1	0	0	1
1860-1869	0	0	0	0	0	0	0
1870-1879	0	0	2	1	1	0	4
1880-1889	1	2	1	3	0	0	7
1890-1899	3	0	0	2	1	0	6
1900-1909	2	1	0	1	0	0	4
1910-1919	4	2	3	0	2	1	12
1920-1929	5	0	2	1	0	1	9
1930-1939	5	0	0	2	1	1	9
1940-1949	1	1	0	6	1	0	9
1950-1959	0	0	2	3	0	1	6
1960-1969	0	2	0	1	0	1	4
1970-1979	3	2	3	4	0	1	13
1980-1989	9	1	5	7	0	0	22
1990-	1	0	1	1	0	0	3
Total	37	13	21	37	13	6	127

In the twentieth century, salary became a source of dissatisfaction during several different periods. In the decade between 1910 and 1920, the judicial departure rate spiked to its highest point since the 1870s. In the 1870s, four judges left for other employment or other office; only one explicitly cited salary as a reason. By contrast, in the 1910s, twelve judges left for other employment or other office, and three cited salary as their motivation for doing so. From the 1910s to the 1960s, the judicial departure rate declined steadily, and then moved upward in the 1970s until it reached the 4% rate seen in the 1940s. Seventeen of the twenty judges departing in the 1970s accepted other employment or other office. Three of those leaving in that decade cited salary as their primary motivation. In the 1980s, the number resigning because of inadequate salary climbed to five; from 1990 to 1992, one judge resigned for that reason.

During the 1970s, a group of federal judges was so angered by Congress's refusal to address the erosion of the judges' real wages that they took the extraordinary step of suing Congress over their remuneration.[96] One hundred and forty-four judges went to court to challenge Congress,[97] claiming that their salaries had been

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[96] *See* Atkins v. United States, 556 F.2d 1028, 1033 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

Judges have gone to court over salary matters several times in the past to challenge the constitutionality of taxing the salaries of Article III judges. *See, e.g.*, O'Malley v. Woodrough, 307 U.S. 277, 281-82 (1939) (holding that Congress did not exceed its constitutional power in "providing that United States judges . . . shall not enjoy immunity from the indices of taxation to which everyone else within the defined classes of income is subjected"); Miles v. Graham, 268 U.S. 501, 509 (1925) (holding that while Congress has the power to fix the compensation earned by judges at stated intervals, "there is no power [for Congress] to tax a judge of a court of the United States on account of the salary prescribed for him by law"), *overruled by O'Malley*, 307 U.S. at 283; Evans v. Gore, 253 U.S. 245, 264 (1920) (holding that Congress was in violation of the Constitution by assessing a tax upon the net income of a U.S. district judge which functioned to diminish his official salary), *overruled by O'Malley*, 307 U.S. at 281-83. In the 1930s, Congress reduced the salaries of retired judges, but the Supreme Court held the salary reduction unconstitutional in Booth v. United States, 291 U.S. 339 (1934). In 1990, another 10 judges sued to be removed from the social security system. *See* Hatter v. United States, 953 F.2d 626, 627 (Fed. Cir. 1992) (holding that the Court of Claims has jurisdiction over a complaint by a group of federal judges alleging that their salary has been diminished as a result of the imposition of social security taxes); Paul C. Roberts, *Confronting Social Security with a Timely Test*, WASH. TIMES, Jan. 22, 1990, at D4.

[97] Forty-four judges filed suit originally; by the time the case went to court their numbers had swelled by another hundred judges. *See* Lesley Oelsner, *44 Federal Judges to Sue for Pay Lost to Inflation*, N.Y. TIMES, Feb. 11, 1976, at A1, A23; *see also* Leslie Oelsner, *A.B.A. Chief Backs Judges' Suit on Pay; Calls Congress 'Unfair,'* N.Y.

unconstitutionally reduced by congressional failure to adjust for inflation.[98] The Court of Claims rejected their argument.[99] The morale of the judiciary was particularly low at this time, and the Commission on Executive, Legislative, and Judicial Salaries (known as the Quadrennial Commission) reiterated in several reports Chief Justice Warren Burger's assertion that judicial resignations due to inadequate salary during the 1970s and 1980s exceeded all judicial resignations for all reasons combined for the preceding 200 years.[100] Although a close look at the history of judicial resignations proves the statement to be inaccurate, the sentiment suggests the depth of concern that the salary issue evoked.

In his 1962 book on judicial malfeasance, author Joseph Borkin suggested that problems with judicial corruption tend to crop up during hard economic times.[101] His focus was on the judicial scandals that surfaced during the Great Depression, a period during which there were eight congressional impeachment investigations, one removal, a resignation of a judge under investigation, as well as the criminal conviction of another judge.[102] The only time period for which there were as many formal allegations of judicial misbehavior was the 1870s, when Congress investigated eight judges, five of whom resigned—one after being impeached but before his trial.[103] Six of the eight judges were charged with offenses at least peripherally involving financial irregularities.[104] Unlike during the 1910s, however, Congress raised judicial salaries such

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TIMES, Feb. 14, 1976, at 41.

[98] *See Atkins*, 556 F.2d at 1033.

[99] *See id.* at 1051.

[100] *See* COMMISSION ON EXECUTIVE, LEGISLATIVE & JUDICIAL SALARIES, FAIRNESS FOR OUR PUBLIC SERVANTS: THE REPORT OF THE 1989 COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES 26-27 (1989); COMMISSION ON EXECUTIVE, LEGISLATIVE & JUDICIAL SALARIES, THE QUIET CRISIS: A REPORT BY THE 1984-85 COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES app. C (1985); COMMISSION ON EXECUTIVE, LEGISLATIVE & JUDICIAL SALARIES, REPORT OF THE COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES 28 (1980); *see also* CORPORATE COMM. FOR FAIR COMPENSATION OF THE FED. JUDICIARY AND THE AM. COLLEGE OF TRIAL LAWYERS, PROMISES MADE, PROMISES STILL UNKEPT: RESTORATION OF INFLATION-INDUCED SALARY CUTS FOR TOP GOVERNMENT OFFICIALS 48-49 (1986).

[101] *See* BORKIN, *supra* note 14, at 207-10.

[102] *See id.*

[103] *See* VAN TASSEL, *supra* note 14, at 24. For a discussion of the 1870 investigations, see *infra* notes 141-45 and accompanying text.

[104] *See* 3 HINDS' PRECEDENTS, *supra* note 14, ch. 79, §§ 2504-16 (describing the charges against Judges Delahay, Bunell, Sherman, Busteed, Blodgett, and Boarman); BORKIN, *supra* note 14, at 233, 238 (Judges Humphries and Wylie). The House did not record the charges against the other two judges.

that real wages actually increased over the course of the decade.[105] For the Supreme Court, real wages increased 44% in 1983 dollars; circuit court salaries increased by 61%, and district court salaries increased by 82%. Supreme Court justices received a salary increase of $4000 over the course of the decade, from $6000 to $10,000. Circuit court judge salaries went from $5000 to $6000 over the same time period, and district judge salaries apparently did not increase at all.[106] On the other hand, the 1980s, a period of boom economic times, saw both significant malfeasance and steady erosion of judicial salaries.[107] This link suggests that low salaries relative to the rest of the legal profession may have some effect on judicial misbehavior.

Resignations in order to go into private practice also raise concerns regarding both the specter of judges giving preferential treatment to litigants who may be future employers and the perception of impropriety that such resignations raise. For instance, when fifty-eight-year-old Judge Royce Savage left the bench in 1961 after twenty years of service, he ran into a barrage of criticism. It did not escape public notice that he was going to work as general counsel to Gulf Oil Corporation less than two years after acquitting Gulf of criminal antitrust charges.[108] The *New York Times* editorialized:

> No one has suggested, nor is there the slightest grounds for thinking, that Judge Savage was moved by improper considerations in the anti-trust case; and there is no law against his now going to work for Gulf. Nevertheless, he showed poor judgment in doing so, because his action tends to lessen public confidence in the independence and integrity of the Federal Judiciary.[109]

President Kennedy, in accepting Judge Savage's resignation, took note of the circumstances of his departure and observed:

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[105] *See* POSNER, *supra* note 31, app. B, at 347.

[106] *See id.*

[107] *See, e.g.*, Joan Biskupic, *U.S. Judges Turn to the Hill for Help on Pay, Work*, 47 CONG. Q. 1322, 1325 (1989) (noting that Congress rejected a proposed judicial pay raise because of public opposition); Anthony Lewis, *What Kind of Judges?*, N.Y. TIMES, Mar. 9, 1989, at A31 (noting that "the rise in prices in recent years has had a devastating effect on federal judges, reducing them from what was a secure if not lavish economic status to genteel insecurity").

[108] *See* DAVID STEIN, JUDGING THE JUDGES 8 (1974).

[109] *The Judiciary's Commitment*, N.Y. TIMES, Oct. 25, 1961, at 36, *quoted in* STEIN, *supra* note 108, at 9.

> the reason that [judges] are appointed for life is so that there can . . . be no actual improprieties [and] no appearance of impropriety . . . . I don't think that anyone should accept a Federal judgeship unless prepared to fill it for life because I think the maintenance of the integrity of the Judiciary is so important.[110]

Hugh Martin Morris, a district judge in Delaware, ran into similar criticism when he accepted a retainer from Universal Oil Products the day after he left the bench to join a corporate law firm a short time after ruling on cases involving Universal.[111] Kennesaw Mountain Landis, on the other hand, resigned under pressure of a threatened impeachment which arose primarily because he accepted the $42,500 per annum job as the first commissioner of baseball while still serving on the bench.[112]

The primary reason for resignation outside of age or health is alternative employment. When the number of judges leaving because of inadequate salary is added to the numbers of judges leaving to return to private practice, to accept appointment to other office, to seek or accept elected office, or to engage in other employment, the result—128 resignations—exceeds all other reasons combined, including resignations for age- or health-related reasons. When appointments to other office and campaigns for elected office are excluded, the number of resignations is seventy-two, although in many instances it is not possible to derive what the underlying motivation might be for leaving the bench. A judge leaving to avoid investigation or prosecution, for instance, would be likely to take other employment and cite this as his reason. What can be said, however, is that judges who resign to take other employment, for whatever reason, still represent less than 5% of the judiciary for the entire period studied.

e. *Allegations of Misbehavior (Including Impeachments and Convictions)*

The rate of judicial departures following allegations of misbehavior is much higher than either the impeachment or the conviction rate. As indicated earlier, twenty-two judges have resigned under fire; these resignations are discussed in detail in the following Part.

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[110] STEIN, *supra* note 108, at 8-9.

[111] *See* STEPHEN B. PRESSER, STUDIES IN THE HISTORY OF THE UNITED STATES COURTS OF THE THIRD CIRCUIT, 1790-1980, at 195 (1982).

[112] *See* 6 CANNON'S PRECEDENTS, *supra* note 14, § 536, at 768-69.

C. *Summary*

While the Article III judiciary has grown enormously over two centuries, from nineteen judgeships in 1789, to 829 judgeships in 1990, the rate of "premature" judicial departures has actually declined precipitously for most of the twentieth century. In the 1910s the departure rate was 12%; in the decade of the 1980s the rate stood at 3.5%, which represents the lowest departure rate for all of but three decades of our history. This indicates that while judges may be vocal in their dissatisfaction with the current state of the judiciary, their dissatisfaction is not manifested in increased rates of resignation.

Statistics indicate that less that 5% of all Article III judges have left office prematurely and returned to private practice or accepted some other form of legal employment. It would be useful and advisable for judicial policymakers—both in Congress and in the judiciary—to be aware of any significant increase in the proportion of this type of resignation, since such resignations may signal dissatisfaction with the judiciary—particularly renumerative—that could manifest itself in misbehavior in judges who stay on the bench. To this end, such information should be kept up-to-date by either the Federal Judicial Center or the Administrative Office of the U.S. Courts.

II. INVESTIGATIONS, PROSECUTIONS, AND THE VALUE OF JUDICIAL INDEPENDENCE

The chilling of judicial independence has been at issue in the context of actions taken not only by the legislative branch, but also by the executive branch and the states. Similarly, the judiciary itself has at times been accused of trying to control or influence the actions of particular judges.[113] The following discussion is intended to be suggestive of the range of circumstances in which federal judges have been subject to investigations and to threats of investigation, prosecution, or impeachment. It is not suggested that the intent has always been to coerce particular judges or the judiciary as a whole. It is suggested, however, that such measures can have the effect of chilling judicial independence and—setting

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[113] *See, e.g.*, Chandler v. Judicial Council, 398 U.S. 74, 75-78 (1970) (involving a petition by U.S. District Judge Steven Chandler challenging the powers of the Judicial Council of the Tenth Circuit after the Circuit found that Judge Chandler was unable or unwilling to discharge his duties efficiently).

aside the constitutional questions—should be understood as a potentially troubling matter of policy.

A. *Judicial Resignations Following Allegations of Misbehavior*

As previously noted, Congress has removed seven Article III judges in the last 200 years.[114] But between 1818, when Georgia's district judge, William Stephens, resigned during a congressional investigation,[115] and 1993, at least twenty-two other Article III judges resigned or retired from the bench under a cloud of impropriety. In some cases, there is no hard evidence linking the resignation with the investigation or other action against the judge. In most of these cases, however, the proximity of the resignation to the investigation or allegations against the judge is, at the very least, suggestive of a connection. This apparent connection should not be viewed uncritically. For example, in the case of Seventh Circuit Judge Samuel Alschuler, who several commentators have indicated retired in response to a congressional investigation,[116] the proximity of retirement to allegations seems to be clearly coincidental. Representative Everett Dirksen of Illinois apparently brought accusations against Alschuler on the floor of the House for political reasons.[117] After referral to the Judiciary Committee, the resolution was tabled. Dirksen's colleagues condemned him for the proceedings, stating that "[n]o mitigating facts or circumstances have been discovered by this committee touching the conduct of the said Everett M. Dirksen, in basing upon a misstatement of facts a false accusation of personal and official dishonesty against the said Samuel Alschuler."[118] The historian of the Seventh Circuit notes that Judge Alschuler and his supporters "felt completely vindicated by the House report."[119] Judge Alschuler did not retire until nine

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[114] *See supra* note 14 and accompanying text.

[115] *See* 3 HINDS' PRECEDENTS, *supra* note 14, § 2489, at 986.

[116] *See* BORKIN, *supra* note 14, at 219-20 (pointing out that Judge Alschuler was the subject of a congressional inquiry); Grimes, *supra* note 2, at 1213 & n.24 (noting that some judges, including Judge Alschuler, have chosen to resign when "apparently feeling the sting of a House inquiry").

[117] *See* RAYMAN L. SOLOMON, HISTORY OF THE SEVENTH CIRCUIT, 1891-1941, at 121 (1981) (quoting H.R. REP. NO. 1802, 74th Cong., 1st Sess. § 1 (1935)) (reporting that Congressman Igoe charged Dirksen with using the accusations against Judge Alschuler to gain publicity in his bid for the governorship of Illinois).

[118] *Id.*

[119] *Id.*

months after the House had exonerated him.

The list of judges resigning or retiring to avoid sanction for inappropriate behavior—or perhaps to avoid bringing discredit on the federal bench—should not be taken as definitive. No record is kept of such resignations, and discovering the motivation for each resignation is often serendipitous. For instance, when Judge John Augustine Marshall of the U.S. District Court of Utah resigned in 1915, no congressional investigation had been launched or threatened. Still, Judge Marshall indicated that he would resign after he, in the words of one observer:

> became enmeshed in a scandal involving the cleaning woman of his courtroom. Mr. Van Cott and Will Ray, who was then United States District Attorney, both thought the accusation was a frame-up and urged the judge to meet the thing head on with a fight to the finish. But the judge resigned from the bench rather than go through the ordeal of the scandal.[120]

There may be other instances in which a judge resigned while under investigation and may have done so to avoid the embarrassment or the expense of contesting the charges. In such instances, the truth of the allegations is left unchallenged, and is thus uncertain.[121]

Having said that, it is still possible to conclude that connections exist between investigations or allegations of misbehavior and subsequent resignations, even if it is not always possible to assess the merits of the investigation or allegations. For instance, Congress investigated Judge William Story of the Western District of Arkansas in 1874 for, among other things, inordinately large (and undocumented) court expenditures[122] and for allowing bail to

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[120] CLIFFORD L. ASHTON, HISTORY OF TERRITORIAL FEDERAL JUDGES FOR THE TERRITORY OF UTAH 1848-1896 AND UNITED STATES DISTRICT JUDGES FOR THE DISTRICT OF UTAH 1896-1978, at 57-58 (1988) (quoting SID N. CORNWALL, THE VAN COTT FIRM, FIRST CENTURY 37-38 (1974)).

[121] Judge Francis Winslow, who resigned during an impeachment investigation, claimed that he did so because "his usefulness as a member of the judiciary was . . . impaired" and that even if exonerated, "the prestige of the court would be impaired should he return to it." 6 CANNON'S PRECEDENTS, *supra* note 14, § 550, at 790-93. He also indicated that the "financial drain of fighting the charges would be too great." *Ex-Judge Winslow of U.S. Bench Dies*, N.Y. TIMES, Mar. 30, 1932, at 19-20.

[122] The investigating committee compared expenditures of the entire state for the three years before the Civil War with expenditures in the Western District for the three years after its creation in 1871, which corresponded with Story's stewardship as district judge. From 1858 through 1860, the average expenditure per year was $20,000 for the entire state. Under Story's tenure the expenditures for the Western District alone averaged more than $241,000 per year. *See The Daily Gazette*, *supra* note 55, at 3.

persons convicted of capital crimes while they were awaiting sentence.[123] The House committee found that Judge Story's testimony was "lame, disconnected and unsatisfactory."[124] Within the month after publication of the committee investigation and report in the *Arkansas Gazette*, Judge Story resigned and moved to Denver.[125] He was elected lieutenant governor of Colorado fifteen years later.[126] A biographical directory of Colorado, published in 1899, implies that the then thirty-two-year-old Story had resigned from the bench in Arkansas for health reasons.[127] Nevertheless, the coincidence of the reports of the congressional investigation and Story's resignation suggests that avoidance of impeachment or possible criminal prosecution was the most likely motivation for his resignation.

Judge Story's case, as well as that of some others, raises the question of whether closer attention to character, background, and "judicial temperament" during the nominating process might diminish the number of problem judges on the federal bench. The average age at appointment of judges who resigned after allegations of misbehavior were made against them was 43.9.[128] Judge Story was twenty-seven when he was appointed; Judge Martin Manton, whose judicial corruption resulted in his prosecution and a prison term after he resigned in disgrace in 1939, was thirty-eight when he was appointed to the bench.[129] Although greater age at appointment does not in itself have any correlation to greater probity of appointees, it would ensure that appointees have enough of a professional record to allow investigators a greater body of activity to assess.[130]

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[123] *See id.*

[124] *Id.*

[125] *See Western District of Arkansas Judge Caldwell to Fill Story's Place Temporarily*, ARK. GAZETTE, June 30, 1874, at 1.

[126] *See* PORTRAIT AND BIOGRAPHICAL RECORD OF THE STATE OF COLORADO 141 (Chapman Publishing Co. 1899).

[127] *See id.*

[128] *See infra* app., tbl. 2.

[129] *See infra* app., tbl. 2.

[130] The National Commission on Judicial Discipline and Removal recommended that "FBI full-field investigations of judicial candidates be as comprehensive as reasonably possible to ensure sound judgments about their integrity and qualifications." NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 82 (1993) [hereinafter COMMISSION REPORT].

Age does not guarantee either competence or good behavior, however. For example, Judge Mell Underwood of the Southern District of Ohio, who took senior status for apparently ordinary reasons,[131] had a number of mandamus cases filed against him because he was "just not doing much work."[132] He first responded to efforts by his circuit council to induce him to retire by digging in his heels, reportedly saying that "I told them to go to hell."[133] Nevertheless, he did end up retiring after the chief judge of the district began supplying reports about his behavior to a statewide newspaper.[134] In other cases, advanced age has caused problems on the bench, though not for the elderly judge. For example, Judge John Warren Davis of the Third Circuit was investigated for writing and selling decisions over Senior Judge Joseph Buffington's signature. Buffington was aging, deaf, and nearly blind, and as such, clearly was not writing the opinions.[135]

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[131] He was 73 years old and had served for nearly 30 years.

[132] PETER G. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 412, 416 (1973).

[133] *Id.*

[134] Other chief judges have used the newspapers to good effect for the modification of judicial behavior. Judge William Campbell, for instance, related his techniques for dealing with backlogs created by judges: "One or two of [the judges] were a bit lazier than the others and I incurred their ill will by reporting that at the end of the year to the press. I never had to report it more than once." Oral History Interview with Judge William J. Campbell, in Washington, D.C. 48 (Aug. 16-18, 1982) (transcript on file with Federal Judicial History Office, Federal Judicial Center). Wheeler and Levin report other, similarly informal disciplinary techniques in their 1979 study of judicial discipline and removal. *See* WHEELER & LEVIN, *supra* note 7, at 13. The example they relate is of a chief judge who had a temporary problem with a judge: "'I called him up,' explained the judge, 'and I said, "You are temporarily assigned to a certain place,"' and he said 'Court is never held there,' and I said 'That is why.'" *Id.* (quoting Chief Judge Richard H. Chambers of the Ninth Circuit in *Hearings Before a Subcomm. of the Senate Judiciary Comm. on S. 3055, 3060-62*, 90th Cong., 2d Sess. 249 (1968)). For an in-depth study of informal disciplinary mechanisms, see Geyh, *supra* note 42, at 243.

[135] *See* BORKIN, *supra* note 14, at 101. A special court sitting by designation of Chief Justice Vinson found that at least five cases were issued under Judge Buffington's name but were actually written by Judge Davis. *See* Root Refining Co. v. Universal Oil Prods. Co., 169 F.2d 514, 532 (3d Cir. 1948).

The court designated by Chief Justice Vinson to review another of the spurious Buffington/Davis opinions was asked to determine "whether Judge Buffington, by virtue of his physical condition in 1938 and his reliance upon Judge Davis, was disqualified from participation in the appeal in this case." *Id.* at 535-36. By vacating its judgment and ordering the district court to do the same, the court avoided answering that question. *See id.* at 541.

Judge Davis's actions came to light in 1939 when he himself took senior status. *See* BORKIN, *supra* note 14, at 116. It is not clear whether he expected his retirement to forestall further action; if he did, he was mistaken. Formal congressional impeach-

B. *Investigations*

1. Congressional Investigations

a. *Changing Roles of Congressional Investigations*

Congressional investigations, initiated as precursors to impeachment proceedings, have frequently triggered judicial resignations. The House has engaged in more than fifty judicial investigations since 1789, resulting in thirteen resignations, four convictions, four acquittals, and five censures.[136] Presently, there are concerns about the number of recent judicial prosecutions that have occurred without congressional investigations.[137] Knowing how congressional behavior has changed over time may offer insights into the nature of the problem.[138]

Although the absolute number of House investigations of Article III judges has not changed significantly over the decades, the percentages have. As with departures, the highest percentage of investigations occurred during the judiciary's infancy. Over the course of the first decade of the nineteenth century, Congress investigated four Article III judges.[139] The average size of the judiciary was twenty-four, so Congress investigated 13% of the judgeships during that decade. The four investigations in the 1820s equaled 11%, which was the second highest rate for the period studied.[140]

After the 1820s, the investigation rate fluctuated from 0% to 5.5% for the rest of the nineteenth century, with the notable exception of the 1870s, when Congress investigated eight judges,

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ment processes were not begun until after his retirement and were not abandoned until after he relinquished his pension rights. *See id.* at 120.

[136] *See infra* app., tbl. 1. These figures do not include territorial judges or judges who have traditionally been listed as resigned, where new evidence shows that they did not resign. They also do not include the recently impeached judges, who were not subjects of congressional investigation prior to their prosecutions by the Justice Department.

[137] *See* Grimes, *supra* note 2, at 1216-18.

[138] For an assessment of changing congressional behavior regarding investigations that includes territorial as well as Article III judges, see *id.* at 1215-16.

[139] They were Judges Chase, Innis, Peters, and Pickering. *See* BORKIN, *supra* note 14, at 226-27, 234-35, 242-43.

[140] The investigations during the 1820s were of Judges Conkling, Tait, Thurston, and Peck. *See* BORKIN, *supra* note 14, at 248-49 (describing the proceedings against Tait); 3 HINDS' PRECEDENTS, *supra* note 14, §§ 2364-84, at 772-804, §§ 2491-92, at 998-91 (describing the proceedings against Conkling, Peck, and Thurston).

11% of the seventy judgeships that the decade averaged.[141] Of the eight judges who were investigated, all were appointed between 1863 and 1871.[142] Lincoln appointed four, Johnson one, and Grant the remaining three.[143] The six whose political affiliation is known were all Republicans, and were investigated at a time when both Congress and the executive branch were controlled by the Republican party.[144] Although animosity between branches figured prominently in the impeachment of President Johnson in 1868 and in the investigation of Justice Field that same year,[145] the party affiliation of the investigated judges suggests that partisan animosity was probably not the motivating factor behind this abnormally large number of investigations.

During the twentieth century, the investigation rate has never climbed above 4%, although in the 1930s the 3.33% rate represented seven investigations, one shy of the record eight investigations of the 1870s. From 1900 to 1910, there were no congressional investigations, although during this time Congress apparently requested that the Justice Department conduct several investigations.[146] From 1910 to 1920, Congress investigated 4% of the judiciary.[147] This percentage dropped to 0.5% in the 1940s and 0% in the 1950s and 1960s, and it went up to 0.2% in the 1970s.[148]

b. *The Reasons for Investigations*

In 1796, the year of the earliest recorded investigation of a federal judge, the House requested the opinion of Attorney General Charles Lee on the best method of proceeding against Ohio Territorial Judge George Turner[149] after receiving a petition

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[141] *See* VAN TASSEL, *supra* note 14, at 29. They were Judges Henry Blodgett, Richard Busteed, Mark Delahay, Edward Durell, David Humphreys, Charles Sherman, William Story, and Andrew Wylie. *See id.*

[142] *See id.*

[143] *See id.*

[144] *See id.*

[145] *See infra* notes 169-83 and accompanying text.

[146] *See infra* part II.B.2.

[147] *See* VAN TASSEL, *supra* note 14, at 29-30.

[148] *See id.*

[149] *See* 3 HINDS' PRECEDENTS, *supra* note 14, § 2486, at 982-83. Judge Turner's case is of interest because it arose during a period when Congress still treated territorial judges in the same manner as Article III judges for the purposes of removal. Territorial judges serve for limited terms, are not Article III judges, and may be removed by the President. Territorial judges were the subject of a number of House investigations until the Supreme Court ruled in 1828 that territorial courts

complaining of Turner's behavior. Because of the expense of conducting an impeachment of a judge so far from the seat of government, Lee suggested that Judge Turner be prosecuted by "information on indictment before the Supreme Court of that territory which is competent to the trial."[150] He informed the House that

> in consequence of affidavits stating complaints against Judge Turner, of oppression and gross violations of private property, under color of his office, which have been lately transmitted to the President of the United States, the Secretary of State has been by him instructed to give orders to Governor St. Clair to take the necessary measures for bringing that officer to a fair trial, respecting those charges, before the court of that Territory . . . .[151]

The House then set aside its own investigation. Although Judge Turner requested that the House investigate the charges against him, the investigating committee reported that his case should be heard before the court of the territory, where Turner would have the opportunity to defend himself.[152]

During the first decade of the nineteenth century, the investigations and impeachment proceedings were a direct result of partisan politics.[153] Throughout Jefferson's administration and beyond, the Jeffersonian Democrats launched repeated attacks on the judiciary.[154] Henry Adams reports in his history of Jefferson's second administration that Senator Tiffin of Ohio proposed an amendment to the Constitution in 1807 that would have changed judicial tenure from a lifetime office to one held for a specified number of years.[155] Senator Tiffin's proposal allowed removal by

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are legislative, not constitutional courts. *See* American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545 (1828). The House Judiciary Committee concluded in 1833 that a territorial judge "is not a proper subject of trial by impeachment" because territorial judges are not "civil officers for the purposes of Article II, § 4 of the Constitution." 3 HINDS' PRECEDENTS, *supra* note 14, § 2493, at 991. Territorial judges have not been included in the statistics for this study.

[150] 3 HINDS' PRECEDENTS, *supra* note 14, § 2486, at 982-83.

[151] *Id.* at 983.

[152] *See id.*

[153] *See* RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 69 (1971).

[154] *See id.* at 69-82.

[155] *See* 4 HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE SECOND ADMINISTRATION OF THOMAS JEFFERSON 205 (Antiquarian Press 1962) (1896).

the President upon address of two-thirds of both houses of Congress.[156] Adams tells us that Tiffin's motion

> was not an isolated or personal act. The State legislatures were invoked. Vermont adopted the amendment. The House of Delegates in Virginia, both branches of the Pennsylvania legislature, the popular branch in Tennessee, and various other State governments, in whole or in part, adopted the principle and urged it upon Congress. In the House, George W. Campbell moved a similar amendment January 30, and from time to time other senators and members made attempts to bring the subject forward.[157]

That same year, Joseph Story listened, appalled, as another senator attacked the judiciary.[158] Story later exclaimed: "Never did I hear such all-unhinging and terrible doctrines. He laid the axe at the root of judicial power, and every stroke might be distinctly felt."[159] Between 1807 and 1812, nine judicial-removal amendments were proposed in Congress.[160] After the fervor of anti-judiciary sentiment subsided, the nineteenth century saw only four other such proposals.[161]

During the 1870s, when Congress most actively investigated federal judges, the entire Grant administration was reeling from disclosure of massive corruption at the cabinet level. The Credit Mobilier scandal went hand in glove with exposure of malfeasance by the Secretary of the Treasury, the Secretary of the Navy, the Attorney General, and the Postmaster General. William Belknap, the Secretary of War, resigned in 1876 but was nevertheless impeached. He avoided conviction only because the Senate decided it lacked jurisdiction.[162]

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[156] *See id.*

[157] *Id.*

[158] *See id.*

[159] *Id.* at 206.

[160] *See* HERMAN V. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY 150 (Burt Franklin 1896).

[161] *See id.* at 150-51. An 1822 proposal would have made "United States judges removable by the President on the joint address of both Houses of Congress." *Id.* at 149-50. In 1837, an amendment was proposed which "provided for the removal of any judge of the Federal Courts whenever the President and two-thirds of Congress should consider that such action would promote the public good." *Id.* at 150. In 1849, an amendment proposed that "whenever a majority of the members of each branch of Congress should concur in an address to the President for the removal of any judge, his office should be vacant from the day of the delivery of such address." *Id.* at 151. An 1867 proposal raised the threshold from a simple majority to two-thirds of both the House and Senate. *See id.*

[162] *See* JOHN BLUM ET AL., THE NATIONAL EXPERIENCE 370-71 (1963); BUSHNELL,

In the 1920s, the Harding administration was similarly rocked by the Teapot Dome scandal.[163] Improprieties in the Justice Department, the Veterans Bureau, and the Interior Department resulted in suicides, resignations, and the first prison term for a cabinet officer in American history.[164] Justice Oliver Wendell Holmes, who averred, "I don't follow politics," was nevertheless moved to comment that "we are investigating everybody and I dare say fostering a belief too readily accepted that public men generally are corrupt."[165] That belief seems not to have been widely shared: the New York newspapers found the scandal of so little concern that they dubbed senators investigating the affair "scandal-mongers," "mudgunners," and "assassins of character."[166] This was the atmosphere of public life that preceded the next major exposure of judicial venality in the 1930s.[167]

The declining number of House investigations after the 1930s probably indicates more about changes in Congress than it does about changes in the judiciary. Beginning in the 1930s, Congress seemed more willing to entrust the Justice Department and the criminal court system with judicial discipline.[168] During the communist witch hunts of the 1950s, Congress did not conduct any formal investigations of Article III judges. This may not mean that judges were more upstanding in the 1950s than at other times, but simply that an institution with significant time constraints had other fish to fry.

c. *Frontal Assaults on Judicial Independence or Constitutional Exercises: The Field, Watrous, and Ritter Proceedings*

Justice Stephen Field was at the center of a controversy early in his career; a controversy that he perceived as a direct attack by Congress on judicial independence. In 1867 and 1868, the Supreme

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supra note 8, at 165-89 (discussing the impeachment of Belknap).

[163] *See* WILLIAM E. LEUCHTENBURG, THE PERILS OF PROSPERITY, 1914-32, at 93 (1966).

[164] *See id.* at 90-94.

[165] Letter from Oliver Wendell Holmes, Jr., to Sir Frederick Pollock (Apr. 6, 1924), *in* 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 132 (Mark D. Howe ed., 1941).

[166] LEUCHTENBERG, *supra* note 163, at 94.

[167] *See generally* BORKIN, *supra* note 14 (detailing the corrupt activities of Judges Martin T. Manton, J. Warren Davis, and Albert W. Johnson in the 1930s and 1940s).

[168] *See, e.g.*, Grimes, *supra* note 2, at 1216 (discussing the development of alternate methods of judicial discipline in the 1930s, including "criminal prosecutions of sitting federal judges and internal measures taken by the judiciary itself").

Court was asked on several occasions to consider the constitutionality of the Reconstruction Acts passed in the aftermath of the Civil War.[169] Field, suspected of harboring hostility towards the Acts, was subjected to what he took to be an attempt to influence his decision and chill the independence of the other justices, as evidenced by a bungled attempt to impeach him.[170]

As Field told it, he was invited to a dinner party that began at about five in the afternoon. By eight, Field was ready to retire and left. Shortly thereafter, Rodman Price, the former governor of New Jersey, arrived and was told to take Field's place at the table. In the course of subsequent conversation, Price expressed the opinion that "the whole reconstruction measures would soon be 'smashed up' and sent to 'kingdom come' by the Supreme Court."[171] A reporter overheard, and immediately asked a waiter for the identity of the speaker; of course, the place card bore Justice Field's name. The comment appeared in the next day's paper, attributed only to a Justice of the Supreme Court. When the story was reprinted by a Baltimore paper, Field was identified as the Justice in question. On January 30, 1868, Republican Representative Glenni W. Scofield of Pennsylvania, introduced a resolution in the House directing the Judiciary Committee to determine whether the reported facts justified an impeachment.[172] The resolution passed by a vote of ninety-seven to fifty-four.[173]

The facts became known soon enough, and the resolution was tabled in June.[174] But Field saw the action as something more than the innocent error that the incident initially suggests. The conflict between Congress and the other two branches of government was at its peak when Scofield introduced his resolution. In December of 1867, the House Judiciary Committee had recommended the impeachment of President Andrew Johnson.[175] Although the House declined to impeach at that time, less than

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[169] *See, e.g., Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868); Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866). For an account of the showdown between the Court and Congress over Reconstruction, see 1 WARREN, *supra* note 51, at 455-97.

[170] *See* CARL B. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 163 (1930).

[171] *Id.* at 162 (quoting STEPHEN J. FIELD, PERSONAL REMINISCENCES OF EARLY DAYS IN CALIFORNIA 174-79 (1893)).

[172] *See* 3 HINDS' PRECEDENTS, *supra* note 14, § 2503, at 1008 (recounting the House's actions in response to the newspaper article).

[173] *See* SWISHER, *supra* note 170, at 163.

[174] *See* 3 HINDS' PRECEDENTS, *supra* note 14, § 2503, at 1008.

[175] *See* BUSHNELL, *supra* note 8, at 135.

three months later Johnson's hostile actions toward Congress and the Reconstruction Acts prompted enough congressmen to shift position for the House to impeach.[176] In January the House Judiciary Committee had also reported a bill intended to restrict the Court's ability to find the Reconstruction Acts unconstitutional.[177] Conservative Republican Gideon Welles referred to the situation as Congress's "war upon the Court."[178] In March the war escalated with the passage of an amendment to an appropriations bill which repealed the appellate jurisdiction of the Supreme Court under the Habeas Corpus Act of 1867 and prohibited the Court from exercising jurisdiction on any appeals already taken.[179]

Newspaper commentary of the time expressed the extreme congressional distrust of the Supreme Court. For instance, *The Independent* informed its readers that "[t]his Congress will not brook opposition from the Court in political matters. The safety of the Nation demands the Congressional Reconstruction shall be successful; and if the Court interferes, the Court will go to the wall."[180] Representative Robert Schenck of Ohio, who had been responsible for the Amendment repealing the Court's Habeas Corpus Act jurisdiction, declared "I hold it to be not only my right, but my duty as a Representative of the people, to clip the wings of that Court."[181]

Under these circumstances, it is not surprising that Justice Field interpreted the impeachment resolution as a sinister act aimed at undermining the independence not only of Field himself, but of the entire Supreme Court.[182] "The resolution was evidently intended to intimidate me," fumed Field, "and to act as a warning to all the judges as to what they might expect if they presumed to question the wisdom or the validity of the reconstruction measures of

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[176] *See id.* at 135-37.

[177] The bill provided that in order to hold a law of Congress invalid, two-thirds of the justices had to concur. *See* 2 WARREN, *supra* note 51, at 465-67.

[178] *Id.* at 471.

[179] *See* Act of March 27, 1868, 15 Stat. 44, 44 ("An act to amend the Judiciary Act . . . ."); Judiciary Act of 1789, 1 Stat. 73, 73 (1845) ("An act to establish the Judicial Courts of the United States."). This rider amendment was aimed directly at *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869), which the Court had consented to hear in February, and which many feared would be the vehicle the Court would use to overthrow the Reconstruction Acts. *See* ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 483 (4th ed. 1970).

[180] 1 WARREN, *supra* note 51, at 477.

[181] *Id.* at 475.

[182] *See* SWISHER, *supra* note 170, at 160-63.

Congress."[183] Although unsuccessful in this regard, if such intimidation had even been the intention, this incident highlights the ways in which disciplinary measures directed against an individual judge may create an atmosphere that is not conducive to the full exercise of judicial independence by other members of the judiciary.

Similarly, Judge John Watrous, the first district judge for the District of Texas, faced a number of politically and financially motivated ouster attempts that he interpreted as a frontal assault on judicial independence.[184] After the House voted not to impeach Judge Watrous in 1858,[185] Senator Sam Houston denounced him on the Senate floor as part of a publicity campaign to turn Texas public opinion against Watrous and pave the way for another impeachment attempt,[186] an effort in which Watrous's enemies were, at least in some measure, successful.[187] On the occasion of this latest of numerous attacks, Judge Watrous decided to reply in a printed pamphlet, in which he stated: "If I am driven from the bench by such methods of annoyance, then have we reached the beginning of the end of anything like independence of the judiciary. . . . [Judges would be forced to] consult the popular cry and not the law."[188] Watrous's remonstrances fell on deaf ears in the House Judiciary Committee, though he found his audience in the full House: for the fourth time, the House refused to impeach the controversial judge.[189]

Although both Justice Field and Judge Watrous survived ouster attempts that they interpreted as direct attacks on judicial independence, Judge Halsted Ritter was removed from office in 1936 under circumstances which suggested to some that "the Senate's decision had been designed to intimidate the Supreme Court."[190] As in the late 1860s, the Court and Congress were at odds—this time over the constitutionality of the legislative apparatus of the New

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[183] *Id.* at 163.

[184] *See* WALACE HAWKINS, THE CASE OF JOHN C. WATROUS, UNITED STATES JUDGE FOR TEXAS: A POLITICAL STORY OF HIGH CRIMES AND MISDEMEANORS 51-53 (1950) (describing efforts to turn public opinion against Watrous).

[185] *See* 3 HINDS' PRECEDENTS, *supra* note 14, § 2498, at 1003.

[186] *See* CONG. GLOBE, 35th Cong., 2d Sess. 99 (1858).

[187] Although the full House failed to act on the resolution, the Judiciary Committee submitted a report that concluded with a resolution to impeach. *See* 3 HINDS' PRECEDENTS, *supra* note 14, § 2499, at 1004.

[188] HAWKINS, *supra* note 184, at 53.

[189] *See* 3 HINDS' PRECEDENTS, *supra* note 14, §§ 2495-99, at 994-1004 (detailing the different impeachment proceedings against Watrous between 1852 and 1860).

[190] BUSHNELL, *supra* note 8, at 286.

Deal.[191] Indeed, the charges against Ritter have been described as "flimsy and poorly developed."[192] In addition, his impeachment trial did not take place until six or seven years after his alleged misconduct, without any further complaints or allegations during the intervening years.[193] Of the seven charges made against Ritter, the Senate was unable to muster a guilty verdict on any of the six specific counts, and convicted only on the final count which combined the previous six.[194] Jacobus ten Broeck suggested that due to the timing of Ritter's impeachment, and "its possible connection with the New Deal attack upon the judiciary, its bearing on the question of feasibility of impeachment as a method of influencing or controlling the judicial department is more immediate and impressive than any of the earlier cases."[195] Eleanore Bushnell speculates that "[b]ecause the House of Representatives had already investigated him in 1933, perhaps Judge Ritter's impeachment emerged as a ready-made and quick route for showing the judicial branch that Congress possessed, and would use, power to chasten it."[196]

The assertion that the Ritter impeachment is an example of congressional use of the impeachment power to intimidate a politically uncooperative judiciary is inconclusive. Nonetheless, along with the Field and Watrous cases it is illustrative of the potential for Congress to use investigation and impeachment as a device for exerting improper control over the judicial department. This possibility weighs against reducing the burden and visibility of the impeachment process by transferring it to a less political body such as the judiciary. The impeachment process has been recognized as a political (as opposed to judicial) process since the founding of the Republic.[197] Impeachments, then, ought to be conducted under circumstances that allow for political redress, especially if they are used for improper purposes such as attempts to compromise judicial independence.[198]

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[191] For a list of the New Deal measures over turned by the Supreme Court between the time Ritter was first brought to the attention of the House, and his trial in 1936, see ten Broeck, *supra* note 58, at 202 & nn.76-83.

[192] BUSHNELL, *supra* note 8, at 285.

[193] *See id.*

[194] *See id.* at 282.

[195] ten Broeck, *supra* note 58, at 198-99.

[196] BUSHNELL, *supra* note 8, at 286.

[197] *See* Nixon v. United States, 113 S. Ct. 732, 735-40 (1993) (holding that impeachment procedures present a nonjusticiable political question); THE FEDERALIST No. 65 (Alexander Hamilton).

[198] I am speaking here only of judicial removals; I do not go so far as some and

2. Department of Justice Investigations

Though it is clear that congressional prosecutions or threats of prosecutions could have an adverse affect on judicial independence, it is less clear whether executive branch investigations or threats of investigations have a similar effect. As the following examples indicate, since the time of Judge Turner, varying opinions have been expressed on the subject of the authority of the executive to investigate federal judges. These opinions have at times been explicitly expressed in Justice Department testimony to Congress and at other times implicitly avowed through the investigative activities of the Justice Department. The investigations that have led to prosecution or impeachment are well known.[199] Investigations that have not resulted in further action against a judge or judges are less visible. Because such investigations have seldom come to public attention, assessing their propriety and impact is much more difficult.

An incident occurring in the early 1920s, in which an assistant U.S. attorney was dismissed for launching an investigation of a judge without authorization, suggests that the Justice Department recognized that it is dangerous to treat the investigation of judges the same way as any other investigation. Assistant Attorney General Rush L. Holland testified before a House Appropriations Subcommittee that

> we recently discharged an employee who, without authority or suggestion, on his own motion, proceeded to investigate a United States judge. We discharged him by reason of the fact that we are not attempting to exercise espionage or jurisdiction over judges. That rests wholly with the Congress, and the Attorney General himself could not issue an order to do a thing of that kind, except when called upon by Congress so to do.[200]

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conclude that discipline short of impeachment and removal should likewise not be entrusted to less visible and politically accountable bodies, such as the Judicial Councils under the 1980 Act. For an exposition of the arguments against having any disciplinary process short of impeachment and against placing such processes in any body other than Congress, see Edwards, *supra* note 23, at 775-93.

[199] *See, e.g.*, BORKIN, *supra* note 14, at 23-186; Grimes, *supra* note 2, at 1216-19. Bushnell provides three instances of Justice Department investigations of judges. *See* BUSHNELL, *supra* note 8, at 290-91, 308, 314 (outlining the investigations of Judges Harry Claiborne, Alcee Hastings, and Walter Nixon, Jr.).

[200] *Hearings Before Subcomm. of House Comm. on Appropriations, Departments of State and Justice Appropriation Bill, 1923*, 67th Cong., 2d Sess., pt. 2, at 163 (1922) [hereinafter *Justice Department Hearings*] (testimony of Rush L. Holland, Assistant Attorney General of the United States).

A few years earlier, in 1913, Attorney General James McReynolds reported to Congress that although

> [n]o inspectors or other agents are appointed or employed by the Attorney General or by the Department of Justice specifically to investigate and report upon the conduct or proceedings of any of the courts or judges of the United States, . . . [w]ithin the past five years agents of the department have investigated the conduct of three judges of courts of the United States appointed under the Constitution to hold office during good behavior . . . .[201]

Among those investigated was Judge Robert Archbald, whom Congress subsequently impeached and convicted.[202] McReynolds indicated that although the President did not possess the power to remove Article III judges, "it seems clearly within his prerogative to inform the House of Representatives of facts which might necessitate a further investigation or an impeachment."[203] Professor Peter Fish suggests that the Justice Department perceived investigations as a potent weapon in influencing how judges did their job, noting that "[w]hatever their intrinsic value, investigations afforded or were perceived as affording the prosecuting department immense leverage in its relations with the judges."[204] Professor Fish quotes Senator William E. Borah's comment that "[i]n different ways and by different methods other than by the usual practice judges are given to understand the views of the Government as to what the law is and what the decision should be."[205]

After Congressman Fiorello LaGuardia preferred charges against Tennessee District Court Judge Harry B. Anderson in March of

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[201] OFFICE OF THE ATTORNEY GEN., DEP'T OF JUSTICE, REPORTS ON COURTS AND JUDGES: LETTER FROM THE ATTORNEY GENERAL, S. DOC. NO. 156, 63d Cong., 1st Sess. 1-2 (1913) [hereinafter COURTS AND JUDGES] (quoting a letter from James C. McReynolds, Attorney General of the United States to the President of the U.S. Senate (Aug. 6, 1913)). McReynolds did not address the issue of whether the Justice Department could legitimately investigate judges with a view toward criminal prosecution rather than impeachment, but the clear implication of his letter was that such an option was not even on the table at that time. *See id.*

[202] According to the testimony elicited at hearings before House of Representatives, both Judge Archbald and Judge Swayne (who had been impeached and acquitted in 1905) were investigated by the Justice Department at the request of Congress. *See Justice Department Hearings*, *supra* note 200, at 181 (testimony of John D. Harris, Chief of the Division of Accounts of the Justice Department). The clear implication of McReynolds's testimony, however, is that the executive branch instigated the Archbald investigation.

[203] COURTS AND JUDGES, *supra* note 201, at 3.

[204] FISH, *supra* note 132, at 103.

[205] *Id.*

1930,[206] Senator Kenneth McKellar of Tennessee accused the Justice Department of having used its investigatory powers in an attempt to intimidate the Tennessee judge.[207] He told Attorney General William Mitchell that he had evidence of a report made by one of Mitchell's assistants, in which the assistant "recommended that you call Judge Anderson before you and tell him that unless he changed his rulings in liquor cases and in matters of procedure that an investigation looking to his impeachment should be immediately begun."[208] Attorney General Mitchell responded by stating unequivocally that "[i]t is clear that Attorneys General have no authority to make investigation [sic] with a view to impeachment of Federal judges, and, so far as I know, no Attorney General has claimed any such authority."[209] He then went on to deny that he had ever received the report that McKellar referred to.[210] He did indicate, however, that the investigation, which he characterized as an investigation of the administration of bankruptcy laws, was being carried out on the department's own initiative, and that, although Judge Anderson was not the subject of the investigation, "during the course of the investigations of departmental agents . . . persons at Memphis, on their own motion, went to the agents of the department and laid before them statements relating to Judge Anderson's official conduct."[211] The Attorney General indicated that the agents had then properly recorded and transmitted these statements to the Justice Department.[212] He denied as well that the Justice Department had made the report of the investigation available to Congressman LaGuardia.[213] Senator McKellar was not mollified, and he informed the Senate that he had brought the matter to their attention

> so that Senators would think over the proposition of whether it is in the province of the Department of Justice to put sleuths on Federal judges and have secret reports made concerning Federal judges in this country. . . . If a Federal judge feels that he is under

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[206] *See* 6 CANNON'S PRECEDENTS, *supra* note 14, § 542, at 776-77.

[207] *See* 72 CONG. REC. 10,881 (1930) (statement of Sen. Kenneth McKellar).

[208] *Id.*

[209] *Id.* at 10,882 (quoting a letter from William Mitchell, Attorney General of the United States to Sen. Kenneth McKellar). *But cf. supra* text accompanying note 201 (quoting Attorney General McReynolds and implying that the opposite is true).

[210] *See* 72 CONG. REC. at 10,882.

[211] *Id.*

[212] *See id.*

[213] *See id.*

> constant scrutiny of the Department of Justice, I do not know that he can make a fair and upright and honest judge. Nor do I think the department, while admitting it has no authority to investigate judges looking to their impeachment, should actually exercise such authority under some other pretense.[214]

In the early 1960s, the judges of the Fourth Circuit indicated by their actions their belief that it was appropriate to go directly to the Department of Justice with a request for an investigation of judicial behavior without first informing Congress. Chief Judge Simon Sobelof wrote to Attorney General Robert Kennedy, indicating that he was sending on

> the file of correspondence passing between our court and counsel for the Textile Workers Union of America and Deering Milliken Corporation following the argument of an appeal in our court. Inasmuch as this relates to alleged conduct of one of our colleagues, we think it appropriate to pass the file on to the Department of Justice.[215]

The Fourth Circuit had itself already conducted an investigation and concluded that the judge in question, Clement Haynsworth, was not guilty of the ethical lapse or possible bribery complained of.[216] The appeal to the Justice Department for an investigation was apparently made to clear Haynsworth's name, and the Justice Department may have seemed a better institution to achieve that end than the House Judiciary Committee.

Ignoring the policies underlying the separation of powers, if not the explicit constitutional mandates vesting exclusive impeachment power in Congress,[217] can sometimes undermine public trust in the judiciary in two directions, depending on the political relationships between the judges and the other two branches. When the President is a member of one party and the judge being investigated is of another, clear issues of partisan pressure surface. On the other

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[214] *Id.* at 10,883. The House determined that impeachment was not warranted, but censured Judge Anderson. *See* 6 CANNON'S PRECEDENTS, *supra* note 14, §§ 542, at 776-77, § 551, at 793 (summarizing the inquiry into Judge Anderson's conduct).

[215] *Hearings on the Nomination of Clement Haynsworth to Be an Associate Justice of the Supreme Court*, *in* 10 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF THE SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1975, at 4 (Roy M. Mersky & J. Myron Jacobstein eds., 1977) (reprinting a letter from Simon Sobelof, Chief Judge of the Fourth Circuit, to Robert Kennedy, Attorney General of the United States (Feb. 18, 1964)).

[216] *See id.* at 2-34.

[217] *See supra* notes 8-12 and accompanying text.

hand, when the judge and the President are of the same party, and questions about the judge's integrity are raised but not pursued, equally disturbing questions may arise. Both circumstances expose threats not only to the reality of judicial independence, but no less importantly to the public perception of judicial independence. The circumstances surrounding the resignation of Supreme Court Justice Abe Fortas in 1969 provide an interesting example of both sides of the partisan coin.

After Associate Justice Fortas's failed nomination to be Chief Justice in 1968,[218] questions began surfacing about his relationship to financier Louis Wolfson, who had recently been convicted of conspiracy to violate the securities laws.[219] In September of 1968, the Senate Judiciary Committee received an anonymous letter advising them to investigate Fortas's relationship with Wolfson.[220] Senator Robert Griffin of Michigan, who had led the earlier fight against Fortas, sought FBI assistance in investigating the matter.[221] Senator Griffin's representative was told that an investigation could be done only with the approval of Attorney General Ramsey Clark. In response, Griffin's representative observed that the Senator would not pursue the matter because "the Attorney General had fully endorsed Fortas and would not authorize the FBI to conduct [an] investigation along lines which might seek to discredit him."[222]

When President Johnson told Ramsey Clark in June that he wanted to elevate Fortas to the Chief Justiceship, Clark was not happy about the prospect of investigating Fortas again.[223] Fortas's biographer, Professor Bruce Murphy, reports that Clark was genuinely concerned about the

> "danger" to the constitutional "separation of powers" in a member of the executive branch saying to a sitting, and presumably independent, judge, "Okay, now, are you an honorable man? Have

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[218] Fortas, a Democrat, was nominated by President Lyndon Johnson (also a Democrat) to be Chief Justice. His nomination was defeated by the Senate Judiciary Committee.

[219] *See* William Lambert, *Fortas of the Supreme Court: A Question of Ethics*, LIFE, May 9, 1969, at 32, 32-37.

[220] *See* LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 360 (1990).

[221] *See id.* at 331-33, 337.

[222] *Id.* (quoting a letter from Carla DeLoach to Clyde Tolson (Sept. 23, 1968)).

[223] *See* BRUCE MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 284 (1988).

> you done anything dishonest? Have you taken bribes, or have you done things foolish?"[224]

Professor Murphy found no evidence that an FBI investigation was initiated.[225]

A few months later, however, the administration had changed with the election of Republican Richard Nixon. *Life* magazine reporter William Lambert was also attempting to investigate the relationship between Fortas and Wolfson, and he was now dealing with a Justice Department more openly hostile to Fortas. Lambert met with Will Wilson, the assistant attorney general in charge of the Justice Department's criminal division. He sought, in that meeting and later, to get Justice Department corroboration of a tip he had received about Fortas's possible financial improprieties. Wilson, who was no fan of Lyndon Johnson's and a critic of the Warren Court, declared later, "I knew what kind of a potential coup we had. In all candor, we wanted Fortas off the Court."[226] Wilson launched his own investigation of the Justice's activities, "making the matter a top priority for the Justice Department."[227] He informed Attorney General John Mitchell and J. Edgar Hoover of the FBI of the connection between Fortas and Wolfson. Mitchell passed the information along to President Nixon.[228]

In an interview with Bruce Murphy in 1982, Wilson confirmed the complicity of the Nixon administration in the production of the damaging article about Fortas that was suspected at the time:

> Lambert returned to the office of a senior Justice Department official and told him that he still needed confirmation of the story. When assistance was not immediately forthcoming, the reporter pressed: "I will not run the story unless I have confirmation of it." So, even though Justice Department files about an ongoing investigation are confidential, the official confirmed the story. This was all that Lambert needed to proceed.[229]

Murphy concludes: "With that, the Nixon Justice Department had now become an accomplice in the production of the story."[230]

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[224] *Id.* (quoting comments by Ramsey Clark, recorded in the Lyndon Baines Johnson Library).

[225] *See id.* at 638 n.55.

[226] *Id.* at 551.

[227] *Id.*

[228] *See* KALMAN, *supra* note 220, at 362.

[229] MURPHY, *supra* note 223, at 555.

[230] *Id.*

After the *Life* magazine story broke questioning Fortas's dealings with Wolfson,[231] President Nixon met with Republican members of Congress to persuade them that impeachment proceedings against Fortas would be inadvisable, since they would only divide the country. Every indication was that Fortas could be forced to resign without impeachment. Attorney General Mitchell arranged to meet with Chief Justice Earl Warren to persuade him to apply pressure on Fortas to resign. After the meeting, Warren remarked to his secretary, "He can't stay."[232] Fortas later said he "had received a message from the Nixon administration that if he did not resign, it would institute criminal proceedings against him."[233] Fortas resigned. A month after Fortas's resignation, Senator Strom Thurmond declared "Douglas is next."[234]

In a relatively recent instance of judicial recalcitrance in the face of requests for resignation, Judge Herbert Fogel of the Eastern District of Pennsylvania remained in office for more than a year after he was investigated in 1976 by the Justice Department for business irregularities occurring before he ascended to the bench.[235] Judge Fogel invoked the Fifth Amendment when questioned before a grand jury about his role in a questionable government contract deal involving his uncle.[236] The *New York Times* reported in November of 1976 that "Deputy Attorney General Harold R. Tyler, Jr. has let it be known to Judge Fogel that it would be best for the reputation of the Federal judiciary if he left the bench voluntarily."[237] Judge Fogel resigned about a year later and returned to private practice.[238]

The same year, the Department of Justice was also investigating Judge John Singleton in Texas, but the Department's efforts to force Singleton to resign were unsuccessful, and a grand jury refused to

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[231] *See* Lambert, *supra* note 219, at 32.

[232] KALMAN, *supra* note 220, at 368.

[233] *Id.* at 374–75. Although impeachment proceedings were never fully pursued against Justice Fortas, Congressman H.R. Gross of Iowa did prepare articles of impeachment. *See id.* at 372.

[234] *Id.* at 374 (quoting a press release from Sen. Thurmond's office dated June 2, 1969).

[235] *See* Nicholas Gage, *U.S. Reportedly Asks Resignation of Judge*, N.Y. TIMES, Nov. 11, 1976, at 19; Ronald Kessler, *GSA Favored Senator's Friend in Lease: Pa. Senator's Friend Got GSA Lease Despite Lower Bids*, WASH. POST, Oct. 1, 1978, at A1.

[236] *See* Kessler, *supra* note 235, at A1.

[237] Gage, *supra* note 235, at 19.

[238] *See* Grimes, *supra* note 2, at 1218 & n.53 (noting that Judge Fogel resigned after the Justice Department threatened to prosecute him).

indict. A journalistic account published in 1980 describes the incident:

> In 1976, a Department of Justice investigation turned up large personal loans to Judge Singleton in the records of Houston's now defunct Franklin Bank. At that time, Judge Singleton was presiding over the criminal prosecution of James Robert Lyne, former president of the bank.
>
> In 1977 Judge Singleton informed his fellow judges that he was being investigated by a federal grand jury in Houston and that he had been asked to resign. Singleton said his problems had arisen out of his getting heavily into debt .... Not only had Judge Singleton not removed himself from the Lyne case, but the Justice Department listed a total of 18 cases in which it thought the judge had a conflict of interest. The grand jury, however, did not indict Singleton ....[239]

The Singleton case highlights the appearance problem that arises when the Department investigates a judge before whom it has appeared as a party in interest. The journalists who reported on the investigation of Judge Singleton pointed out that "Singleton's rulings have often angered Justice Department officials .... Is the judge the target of a vendetta by unknown Justice officials who simply resent his liberal (by Texas standards) record?"[240]

There is also evidence that, on occasion, individual U.S. attorneys have initiated investigations or charges against federal judges, although with little success and sometimes dire, but predictable, results. In the case of West Virginia District Judge William Baker, the complaints lodged by the U.S. attorney prompted Congress to launch an impeachment investigation, after which Baker was exonerated.[241] Chief Justice Taft was outraged by this intrusion and attempted to get the Judicial Conference to adopt a resolution supporting the replacement of the U.S. attorney.[242] The acrimony between Judge Baker and the U.S. attorney had apparently "paralyzed judicial business in the district."[243]

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[239] Clark Mollenhoff & Greg Rushford, *Judges Who Should Not Judge*, READER'S DIG., Feb. 1980, at 39, 44, *reprinted in Judicial Tenure and Discipline 1979–80, Hearings Before the House Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 473 (1980).

[240] Clark Mollenhoff & Greg Rushford, *What Can Be Done About Unfit Judges?*, WASH. POST, Apr. 23, 1978, at 13.

[241] *See* 6 CANNON'S PRECEDENTS, *supra* note 14, § 543, at 777-78; FISH, *supra* note 132, at 47.

[242] *See id.*

[243] *Id.*

3. Outside Investigations

Threats to investigate or launch charges have not always had the desired result. Judge Peter Grosscup of the Seventh Circuit announced in 1911 that he wanted to leave the bench to become more active in politics. The newspaper story about Grosscup's intentions also revealed, however, that Grosscup had been shadowed for the previous two years by a private detective for a muckraking magazine. Former U.S. Solicitor General Charles Aldrich announced that he had supplied information for the magazine's investigation, and charged that Grosscup was resigning because of what the magazine had uncovered. Grosscup responded by declaring that he would withdraw his resignation if formal charges were made against him. The magazine's publisher backed down, asserting that he wished to do nothing that might stand in the way of Judge Grosscup's resignation. As the Seventh Circuit's historian puts it: "The judge resigned October 23, 1911, with the allegations of malfeasance never having been formally made or proven—yet not disproven."[244] It may be that Grosscup's initial decision to resign was motivated by the magazine's informal investigation, but his threat to revoke his resignation suggests that formal charges might have caused him to stand his ground and fight.

It is clear that many resignations have followed from the use or threats of the use of formal investigatory and prosecutorial mechanisms. What is no less clear, but far less quantifiable, is that resignations and retirements of unfit judges have been accomplished through less formal—and less public—persuasion. Neither public pressure nor behind-the-scenes urging have been uniformly effective, but it is clear that the existence of the big stick of impeachment in conjunction with the mechanisms more recently provided by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,[245] allows the occasional effective use of soft speech in "suggesting" modification of judicial behavior[246] or resignation or retirement from office.[247]

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[244] SOLOMON, *supra* note 117, at 88.

[245] Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. § 372(c) (1988 & Supp. IV 1992)).

[246] *See supra* note 134 and accompanying text (discussing examples of informal modification of judicial behavior by chief judges).

[247] The 1980 Act, of course, has only provided leverage for inducing modification of judicial behavior for the past 13 years.

C. *Prosecutions Outside the Impeachment Process*

One concern that has been expressed about various proposals to reform or streamline judicial discipline has been that judges should be fully accountable for their actions and subject to the full range of prosecution, both local and federal, for all transgressions of the law. Although the constitutionality of prosecuting judges prior to impeachment and conviction is an unresolved and pressing issue, there are strong arguments that the framers of the Constitution never intended that impeachment must invariably precede other legal actions against federal judges.[248] The bribery section of the Crimes Act of 1790[249] is the most often cited example of eighteenth-century understanding of the issue.[250] Perhaps a more immediately compelling example is the case of Supreme Court Justice James Wilson.

Justice Wilson's tribulations, widely known to his contemporaries, support the contention that the founding generation did not contemplate federal judges being above the law, nor imprisonment (albeit of a "private" nature, without immediate resort to impeachment to remove a judge from the bench). Appointed by George Washington to the first Supreme Court in 1789, James Wilson had already had an outstanding career in the law and in nation-building.[251] In addition to his more admirable activities, however, Wilson engaged in various speculative financial schemes, which began to catch up with him in the closing years of the eighteenth century.[252] In 1798, Harrison Gray Otis wrote to his wife that

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[248] *See, e.g.*, Shane, *supra* note 11, at 225-32; Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643, 665-73 (1988) (elaborating the arguments in favor of allowing preimpeachment criminal prosecution).

[249] Act of Apr. 30, 1790, § 21, 1 Stat. 112, 117. Section 21 states, inter alia, that "the judge . . . who shall in any way accept or receive [a bribe], on conviction thereof, shall be fined and imprisoned at the discretion of the court," and "shall forever be disqualified to hold any office of honour, trust, or profit under the United States." *Id.*

[250] *See, e.g.*, Elizabeth B. Bazan, *Disqualification of Federal Judges Convicted of Bribery–An Examination of the Act of April 30, 1790 and Related Issues*, *in* 2 RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 1285, 1297-1301 (1993); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternative*, 68 TEX. L. REV. 1, 29-32 (1989) (discussing some commentators' views on the implications of the Act of 1790). Professor Shane argues that the Crimes Act argument is "inconclusive." *See* Shane, *supra* note 11, at 228.

[251] *See* 1 WARREN, *supra* note 51, at 45.

[252] *See* DOCUMENTARY HISTORY OF THE SUPREME COURT, 1789-1800, *supra* note 49, at 48.

Justice Wilson "left this city [Philadelphia] a few days since to escape from his creditors but managed with so little address that he has got himself arrested at New Castle in Delaware where he will probably be imprisoned."[253] Wilson was indeed imprisoned; after his release, he rode the Southern Circuit in an attempt to flee further from his creditors.[254]

There may have been some initial question about whether process could be served on the Justice while actually sitting: South Carolina Congressman John Rutledge, Jr. (son of Associate Justice Rutledge), wrote to his uncle Edward Rutledge that "heretofore it has been supposed by [Wilson's] Creditors that he was not tangible during the sitting of the Court, but this doctrine is over-ruled, & he has not been able to make his appearance at the Court held this month."[255] Wilson's judicial activities were further disrupted when another creditor caught up with him on the Southern Circuit and had him imprisoned in Edenton, North Carolina, for two months in the spring of 1798.[256] This state of affairs probably would not have been allowed to continue, however, had Wilson's death in August of 1798 not intervened. Samuel Johnston wrote to his brother-in-law, Justice James Iredell, intimating that a prosecution was in store if Wilson could not bring himself to resign, opining that, "surely, if his feelings are not rendered altogether callous, by his misfortunes, he will not suffer himself to be disgraced by a conviction on an impeachment."[257] With the exception of the brief reticence of Wilson's creditors to serve process while he was sitting—which appears to have been more out of deference to the Court than a sense of Wilson's individual judicial immunity—there is no evidence of objection to his imprisonment as an unconstitutional removal. Of course, private prosecutions do not

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[253] Letter from Harrison Gray Otis to Sally Otis (Feb. 18, 1798), *in* 1 DOCUMENTARY HISTORY OF THE SUPREME COURT, 1789-1800, *supra* note 49, at 858.

[254] *See id.* at 859 n.1.

[255] Letter from Representative John Rutledge, Jr., to Edward Rutledge (Feb. 25, 1798), *in* 1 DOCUMENTARY HISTORY OF THE SUPREME COURT, 1789-1800, *supra* note 49, at 858.

[256] There may be some question about whether Wilson was physically restrained in Edenton or was kept there under threat of imprisonment. *See* Letter from Pierce Butler to Samuel Wallis (June 14, 1798), *in* 3 DOCUMENTARY HISTORY OF THE SUPREME COURT, 1789-1800, *supra* note 49, at 277-78 n.3; Letter from Hannah Wilson to Bird Wilson (Sept. 1, 1798), *in* 3 DOCUMENTARY HISTORY OF THE SUPREME COURT, 1789-1800, *supra* note 49, at 289 n.1.

[257] Letter from Samuel Johnston to James Iredell (July 28, 1798), *in* 1 DOCUMENTARY HISTORY OF THE SUPREME COURT, 1789-1800, *supra* note 49, at 859.

implicate the same concerns about independence as prosecutions emanating from the executive department. Judges enjoy no immunity from liability in civil actions unconnected with their judicial function.[258]

1. Department of Justice Prosecutions

Although not dispositive of the constitutionality of preimpeachment prosecutions, historical precedent indicates an acceptance of them. This presumption has not always been accepted: statements by attorneys general and their staffs indicate that the Department of Justice did not settle into an assumption of the propriety of unilateral prosecutions until sometime after the 1920s, and perhaps not until the 1970s. As the earlier discussion of Justice Department attitudes toward the investigation of federal judges suggests, the Department vacillated somewhat in the early decades of this century on the propriety of conducting investigations without a congressional request that it do so.[259] It is likewise difficult to determine exactly when the Department concluded that unilateral prosecutions were permissible.

In 1905, the Justice Department concluded in the case of Judge Francis Baker that preimpeachment prosecution was impermissible.[260] By 1973, this understanding no longer held true.[261] When the change in policy occurred is unclear. Although the Department of Justice sought indictments against numerous judges in the intervening years, in each case the judge resigned prior to prosecution.[262]

In 1905, under Attorney General William H. Moody (who joined the Supreme Court the following year), the Justice Department took the position that no sitting judge could be indicted without first being removed from office by impeachment. In that year, complaints surfaced that Seventh Circuit Judge Francis Baker had coerced postal employees to contribute to the Indiana State

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[258] *See* MARVIN COMISKY & PHILIP C. PATTERSON, THE JUDICIARY: SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE 235-36 (1987) (noting that judicial immunity from civil liability obtains only when the challenged action is "judicial" in nature).

[259] *See supra* text accompanying notes 200-03.

[260] *See infra* notes 263-65 and accompanying text.

[261] In 1973, the Justice Department initiated a prosecution of Judge Otto Kerner, Jr. *See infra* notes 266-69 and accompanying text.

[262] For example, Judges John Warren Davis, Martin Manton, and Albert Johnson, were all indicted by the Justice Department, but each resigned before being prosecuted. *See* VAN TASSEL, *supra* note 14, app.

Republican Party in 1902.[263] A postal employee in Goshen, Indiana, filed charges with the U.S. Civil Service Commission, which

> investigated the matter and issued findings in October 1905. Their report detailed a story, corroborated by several witnesses, in which employees were told by the assistant postmaster to pay a visit to Judge Francis Baker. The judge explained to the employees that it was in the workers' best interests to ensure that Republicans were kept in office, as Democrats would probably fire them. The judge then told the employees that he gave liberally to the party (about 5 percent of his salary) and that they should do the same. One worker said he could not afford that amount, and the judge is reported as replying, "You can afford to do without a suit of clothes and make the payment."[264]

The commission recommended turning the matter over to the Department of Justice, where it was determined that both legal and political barriers stood in the way of indicting Judge Baker. The first contention was that preimpeachment prosecution was impermissible, and the second was that even if indictment without impeachment was possible, the statute of limitations appeared to have run. Impeachment was considered improbable since Congress was unlikely to either impeach or convict on the charges alone. As a result, Baker continued in office. In the end, the matter was so thoroughly forgotten that Baker was among three finalists for a Supreme Court seat in 1922.[265]

When another Seventh Circuit Judge, Otto Kerner, Jr., was indicted for offenses committed while he was governor of Illinois, his counsel argued that indictment was tantamount to removal and thus unconstitutional because it was outside the sole constitutionally prescribed means of removing a federal judge.[266] The Seventh Circuit did not agree, noting that "[p]rotection of tenure is not a license to commit crime or a forgiveness of crimes committed before taking office."[267] The court not only found no support for Kerner's position, but opined that judicial independence "is better

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[263] *See* SOLOMON, *supra* note 117, at 61.

[264] *Id.* at 61-62 (citation omitted).

[265] *See id.* at 63. Solomon notes that "[a]n investigation of the Justice Department appointment files of Judge Baker in the National Archives revealed no mention of the 1905 scandal during the selection process." *Id.* at 63 n.76.

[266] Brief for Appellant Otto Kerner, Jr., at 43-52, United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1973) (No. 73-1410). The charges against Kerner included bribery, mail fraud, and tax evasion.

[267] *Isaacs*, 493 F.2d at 1142.

served when criminal charges against its members are tried in a court rather than in Congress. With a court trial, a judge is assured of the protections given to all those charged with criminal conduct."[268] Judge Kerner resigned after his appeals were denied,[269] so the ancillary question of what to do about criminally convicted and imprisoned judges who do not resign was left to the judicial prosecutions of the 1980s and early 1990s.

2. Local Prosecutions

Toward the end of the nineteenth century, another Supreme Court justice briefly found himself on the wrong end of the law, although unlike the source of James Wilson's travails,[270] this time it was the criminal law. While riding circuit in California, Justice Stephen Field heard a messy case involving marriage, divorce, fraud, and forgery.[271] The plaintiff and her attorney, David S. Terry (a former justice on the Supreme Court of California), were volatile, vindictive sorts who threatened violence against Field on several occasions. The special deputy hired to protect Field against these threats eventually shot and killed Terry when Terry attacked Field. Field was arrested for murder, although he avoided jail by immediately filing a petition for habeas corpus. After a preliminary hearing, Field was released on his own recognizance with a $5000 bond. Before any jurisdictional or constitutional matters could be raised, California's governor intervened and successfully urged that the proceedings be dismissed. Another of the judges involved noted that

> [w]e are extremely gratified to find that, through the [action of the] chief magistrate, and the Attorney-General, a higher officer of the law, we shall be spared the necessity of further inquiry as to the extent of the remedy afforded the distinguished petitioner, by the Constitution and laws of the United States, or of enforcing such remedies as exist, and that the stigma cast upon the state of California by this hasty and, to call it by no harsher term, ill-advised arrest, will not be intensified by further prosecution.[272]

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[268] *Id.* at 1144.

[269] *See Kerner Quits U.S. Appeals Judgeship*, WASH. POST, July 25, 1974, at A2; *Kerner Resigns Seat*, N.Y. TIMES, July 25, 1974, at 34; Seth S. King, *Ex-Gov. Otto Kerner Dies; Convicted While a Judge*, N.Y. TIMES, May 10, 1976, at 30.

[270] *See supra* text accompanying notes 251-57.

[271] *See* Sharon v. Hill, 26 F. 337 (C.C.D. Cal. 1885); SWISHER, *supra* note 170, at 321-61.

[272] SWISHER, *supra* note 170, at 355 (citation omitted).

The question of whether a federal judge can be tried, convicted, and imprisoned without first being impeached, convicted, and removed by Congress remains unanswered.

In 1907, Illinois prosecutors succeeded in what was probably the first indictment of a sitting federal judge.[273] Judge Peter Grosscup of the Seventh Circuit was also president and principal owner of the Mattoon City Railway, which had been involved in a serious accident in which fifteen people were killed and many others injured. This event, in conjunction with two previous accidents involving serious injuries, caused community outrage of sufficient magnitude to encourage a prosecutor to seek indictments of the owners on charges of criminal negligence. Grosscup, along with five other directors, was brought to trial in February of 1908. After three days of argument, the judge quashed the indictments on the grounds that there could be no criminal liability unless the directors were actually present and in control of the train. The circumstances do not seem to implicate judicial independence: the holding of the court was based on lack of personal liability of directors. Indeed, unlike the prosecution of Judge Otto Kerner, Jr.—also for nonjudicial actions[274]—the prosecution of Judge Grosscup was not initiated by a federal prosecutor of the opposite party. No one addressed the question whether Grosscup, as a sitting federal judge, had to be impeached before being indicted.[275]

3. Summary

Consultants to the National Commission on Judicial Discipline and Removal, as well as the Commission itself in its Report, acknowledge the value of Justice Department prosecutions independent of the impeachment process.[276] The Commission recommends their continuation with additional safeguards to ensure full disclosure to Congress and oversight within the Department.[277]

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[273] *See* SOLOMON, *supra* note 117, at 58. This statement is reserved to Article III judges. As is noted above, territorial judges may have received different treatment. *See supra* note 149.

[274] *See supra* notes 266-69 and accompanying text.

[275] *See* SOLOMON, *supra* note 117, at 57–58.

[276] *See* COMMISSION REPORT, *supra* note 130, at 72-79.

[277] These safeguards would include sharing information with Congress if an impeachable offense is involved, and requiring that any "full scale investigation" of a federal judge or "intrusive investigative techniques" used in such an investigation be cleared by the Attorney General herself. *Id.* at 79, 81.

The practical reality these recommendations reflect is the fact that congressional policing of the more than 800 sitting federal judges and a cadre of senior judges is effectively impossible. This reality, however, is tempered by the disciplinary mechanisms provided for under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.[278] With the Act in place and applied properly, the burden on Congress should arise only as a last resort or when members of Congress are sufficiently concerned about a particular judge to set the impeachment machinery in motion.

As Professor Shane has argued, the framers did not discuss or address "judiciary-dependent" means for judicial removal.[279] Thus, making *constitutional* arguments one way or the other is less fruitful—because such arguments are ultimately indeterminate—than addressing the issue anew and assessing the historical record with regard to how "judiciary-dependent" discipline and removal has functioned in the context of judicial independence concerns. History cautions against assuming that the protections of the criminal justice system, which are, at least formally, available to all American citizens, are adequate to protect societal interests in judicial independence. While it seems reasonable to assume that, in the criminal context, a judge who has done nothing wrong should have nothing to fear from the criminal justice system, and a judge who has done something wrong should be exposed and brought to justice, independence issues complicate the equation. The judiciary has come under significant and sustained attack from the Executive and from Congress at various times in our history.[280] Congressional attacks are carried out in a relatively public fashion with the admittedly imperfect protections that the political process provides. But while impeachment is serious, it is clearly political, and, perhaps as a consequence, does not carry the same stigma—and certainly not the same penalties—as criminal conviction.[281]

Executive attacks, on the other hand, have sometimes been carried out in ways that may not only undermine the appearance of

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[278] Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. § 372(c) (1988 & Supp. IV 1992)).

[279] *See* Shane, *supra* note 11, at 212.

[280] *See supra* notes 169-243 and accompanying text.

[281] Witness the election of former Judge Alcee Hastings to the very body that effected his removal from the bench through the impeachment process. The conclusion of one student of the impeachment of federal judges is that only the least culpable judges refuse to resign, choosing to take their chances with impeachment. *See* BORKIN, *supra* note 14, at 195.

integrity of the Justice Department,[282] but also may undermine public faith in the independence of the judiciary. The actions of Attorney General John Mitchell regarding Justice Abe Fortas[283] or Attorney General William Mitchell regarding Judge Harry Anderson[284] suggest that vesting the responsibility for approving investigations and prosecutions in the Attorney General may not be adequate to allay the appearance of executive branch manipulation of judicial independence.

III. RETIREMENT AND DISABILITY

Some commentators argue that many problems with federal judges can be attributed to the aging process and its attendant infirmities.[285] Congress has occasionally acted over the years to deal with these problems by giving aging judges incentives to retire. The following discussion provides a statutory and historical context for the choices that judges have made about retirement and the attempts to deal with judicial infirmity.[286]

A. *Retirement*

For the first eight decades of the federal judiciary, Congress made no provision for the retirement of Article III judges. Aged judges were forced to choose between resigning from the bench and losing their salary, or continuing in office (often despite incapacity) in order to retain financial support. During that eighty-year period, only twenty judges left office for reasons of age or health. By way of comparison, Congress investigated sixteen Article III judges during that same period; five of those judges resigned or were removed.[287] Within the first thirty years after Congress provided for retirement, the number of retirements equaled the number of age and health resignations for the previous eighty years.

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[282] *See supra* note 240 and accompanying text (discussing the appearance problems created by the investigation of Judge John Singleton).

[283] *See supra* text accompanying notes 226-34.

[284] *See supra* text accompanying notes 206-14.

[285] John S. Goff, *Old Age and the Supreme Court*, *in* SELECTED READINGS: JUDICIAL DISCIPLINE AND REMOVAL 30, 30 (Glenn R. Winters ed., 1973).

[286] Current retirement and disability provisions are codified at 28 U.S.C. §§ 371-372 (1988 & Supp. IV 1992).

[287] For the 16 investigations, see *infra* app., tbl. 1. The five judges who resigned or were removed as a result of investigations were John Pickering (D.N.H. 1804), William Stevens (D. Ga. 1818), Matthias Tallmadge (D.N.Y. 1819), Thomas Irwin (W.D. Pa. 1859), and West H. Humphreys (D. Tenn. 1862).

Lacking any provision for retirement, many judges remained on the bench after becoming incapable of serving adequately. For instance, Justice Henry Baldwin, appointed to the Supreme Court by Andrew Jackson in 1830, died in office in 1844 at the age of sixty-four.[288] One account states that "[t]owards the close of his life his intellect became deranged, and he was violent and ungovernable in his conduct upon the bench."[289] Of Associate Justice John McKinley, Attorney General John J. Crittenden commented that "for many of the last years of his life he was enfeebled and afflicted by disease, and his active usefulness interrupted and impaired."[290]

Between 1809 and 1869, members of Congress proposed four constitutional amendments that would have established mandatory retirement ages for federal judges.[291] Senator Pope of Kentucky proposed the first of these in 1809 in connection with a proposal for the removal of judges which would have forced judges to retire at sixty-five.[292] Similar proposals reached the floor in 1826 and 1836.[293] In 1869, Representative Ashley bemoaned the state of the Supreme Court with "one-third of its members sleeping upon the bench and dying with age, and one-third or more crazed with the glitter of the Presidency."[294] He proposed dealing with part of the problem by constitutionally limiting judicial terms to twenty years and mandating retirement at age seventy.[295]

Although it failed to approve Ashley's amendment in 1869, Congress that year for the first time passed retirement legislation allowing a judge who had reached the age of seventy and who had served at least ten years to retire on an annual pension equal to his salary at the time he retired.[296] This law was the first glimmer of

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[288] *See* BICENTENNIAL COMM. OF THE JUDICIAL CONFERENCE OF THE U.S., JUDGES OF THE UNITED STATES 19 (2d ed. 1983).

[289] *See* Goff, *supra* note 285, at 31 (quoting 1 HAMPTON L. CARSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 281 (1902)).

[290] *Id.* at 32.

[291] *See* AMES, *supra* note 160, at 151 (describing the content of proposals designed to limit tenure of judges). Another 18 legislative amendments proposed between 1807 and 1879 would have limited judicial terms in office, with the limits ranging from 4 to 20 years. *See id.* at 151–52.

[292] *See id.* at 151.

[293] *See id.*; *see also* S.J. Res. 22, 26, 28-29, 11th Cong., 2d Sess. (1908).

[294] AMES, *supra* note 160, at 151.

[295] *See id.*

[296] *See* Act of Apr. 10, 1869, ch. 22, § 5, 16 Stat. 44, 45 ("[A]ny judge of any court of the United States, who, . . . having attained to the age of seventy years, [shall] resign his office, shall thereafter, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.").

official recognition that the constitutional language defining judicial tenure as "during good behavior" need not always mean "for life," and that there were good reasons to allow elderly judges to retire without consigning them to destitution.[297]

The first instance of a requested retirement under the new act was probably that of Justice Robert C. Grier.[298] Elderly and ailing, the judge submitted his resignation in December of 1869 after a committee of justices visited him to request that he step down.[299] Many years later, the aged Justice Stephen Field was reminded of his participation in seeking Grier's resignation when confronted with a similar deputation, prompting him to exclaim, "a dirtier day's work I never did in my life!"[300]

Lower court judges as well as Supreme Court justices immediately availed themselves of the new retirement provisions. Between 1869 and 1919, approximately one judge per year retired under the new provision. Then, in 1919, Congress made it possible for judges to retire from active duty without resigning from office.[301] This provision allowed judges over the age of seventy to continue to

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[297] The discussion of retirement and disability legislation has benefitted greatly from the following sources: *Judicial Independence: Discipline and Conduct: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 24-26 (1989) (testimony of U.S. Circuit Judge Frank M. Coffin) [hereinafter *Hearings*]; Robert Keeton, *The Office of Senior Judge, in* 2 FEDERAL COURT STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 154 (1990); Memorandum from Eric Laumann to Professor Stephen Burbank (Aug. 4, 1989) (describing research done while Laumann was a student at the University of Pennsylvania Law School) (on file with author).

[298] *See* Goff, *supra* note 285, at 32 (noting that the resignation of the mentally and physically disabled judge was forced).

[299] *See id.*

[300] *Id.* at 35.

[301] *See* Act of Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1156, 1157. Section 6 states:

> But, instead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge of that circuit and be by him authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake, or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to undertake, or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake.

Id.

serve according to their desire and ability, while allowing the President to appoint an additional judge to carry a full caseload. Since 1919, Congress has fine-tuned judicial retirement provisions on several occasions.

Changes in the rules governing judicial retirements that have occurred piecemeal over the course of the twentieth century in conjunction with a dearth of historical and statistical information about senior judges, complicates policy analysis in this area. As an initial matter, knowing what the rules governing judicial retirement have been at different points in time provides a framework for assessing any changes over time in such things as the rates of senior status retirements versus "complete" retirements and whether incentives to retire have historically served the interests of both the judges and the institution. In 1937, Supreme Court justices were given the same choice between retiring or resigning that other life-term judges had been given in 1919.[302] In 1948, Congress modified the salary provisions so that judges resigning at age seventy, after ten years of service, would receive the salary they were receiving when they resigned, but judges choosing to retire from regular active service would receive the salary of the office—that is, they would be eligible for all pay raises.[303] In 1954, Congress extended the "senior status" option (retirement from regular active service on the salary of the office) to judges who had reached the age of sixty-five and served at least fifteen years. Judges who wished to resign on salary still had to be seventy and have served for at least ten years.[304] In 1958, Congress changed the name of judges retiring from regular active service from "retired" judges to "senior" judges.[305] In addition, judicial retirement provisions have been modified several times since 1980, the original cut-off date for this study. Since 1980, for instance, the modified "rule of 80" was adopted, allowing judges to take senior status on a sliding scale of age and service, starting at age sixty-five with fifteen years of service, and moving up to age seventy with ten years of service, always providing that the sum of age and years of service equal eighty.[306]

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[302] *See* Act of Mar. 1, 1937, ch. 21, 50 Stat. 24, 24.

[303] *See* Act of June 25, 1948, Pub. L. No. 80-713, ch. 646, 62 Stat. 869, 869.

[304] *See* Act of Feb. 10, 1954, Pub. L. No. 83-294, ch. 6, 68 Stat. 8, 12.

[305] *See* Act of Aug. 25, 1958, Pub. L. No. 85-755, § 5, 85 Stat. 848, 849.

[306] *See* Act of July 10, 1984, Pub. L. No. 98-353, tit. I, § 204(a), 98 Stat. 333, 350 (codified at 28 U.S.C. § 371 (1988)).

Additionally, the late 1980s saw the introduction of a service certification process for judges to remain in senior status.[307]

Between 1919 and 1979, approximately 450 judges retired or took senior status.[308] From 1980 to 1989, at least 197 judges retired from regular active service (took "senior status") and an additional fourteen "retired from the office." Of the 211 judges who chose to reduce their workload once they became eligible to do so, 7% resigned completely. From 1990 to the end of 1992, ninety-nine judges took senior status and fourteen more chose to resign completely, representing an apparent doubling of the rate of "retirements from the office" to 14%.[309] Of the fourteen judges who retired from the office from 1990 to 1992, we have information on the subsequent activities of all but one. Seven judges have returned to private practice, three have taken full-time teaching positions, one retired completely, and two have engaged in business activities. The average age at termination of those retiring from the office in the 1990s is seventy-five; the average age at termination of the seven who are known to have gone into private practice is sixty-nine. These seven judges served on the federal bench for an average of eighteen years each.

Because the 1990 numbers represent only three years of the decade, and because we do not yet have historical data for comparison, these numbers should be interpreted with caution. But there is a perception within the judiciary that there is a rising number of judges who may be treating the judiciary, in the words of Chief

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[307] *See, e.g.*, Act of Nov. 30, 1989, Pub. L. No. 101-194, tit. VII, § 705(a), 103 Stat. 1716, 1770 (amending 28 U.S.C. 371(a) (1988)).

[308] Currently, no accurate figures exist on the total number of judges who have taken senior status since its inception in 1919 or on the number who retired from office under what is now § 371(a). The information supplied by the Administrative Office personnel office only goes back to 1966 and appears to be incomplete, and the information in the FJHO Judge Biographical Database on senior status judges is being updated and verified. In a report to Congress in 1976, the AOUSC listed only one judge as receiving a pension under § 371(a). *See Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. app. A (1976) (statement of Joseph F. Spaniol, Jr.). According to a list created by the General Counsel's Office of the AOUSC, updated as of the end of 1992, an additional judge retired from the office effective 15 days before the above hearings.

[309] These numbers were taken from a list of judicial resignations and retirements provided by the General Counsel's Office of the AOUSC, in conjunction with a list of senior status judges provided by the Human Resources Division of the AOUSC and a list generated from the FJHO Judge Biographical Database. Because of the way statistics and information have been collected and organized in the past, these numbers should be treated as illustrative rather than definitive.

Justice Rehnquist, as "a stepping stone to a lucrative private practice."[310] Judge Abner Mikva (now Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit) noted that "[t]his is supposed to be the last stop on the road. A judge shouldn't be thinking about going back to work for a law firm that's coming before him. That's unhealthy."[311] What these numbers suggest, then, is that further study should be done of both senior judges and judges who have retired from the office in the twentieth century.[312]

B. *Disability*

Retirement provisions did not solve all the problems of incapacity on the bench. Section 25 of the short-lived Judiciary Act of 1801 had provided for disability of district judges by directing that the newly created circuit courts would have the power to appoint a circuit judge from the court to take over the duties of a disabled district judge within the circuit for as long as the disability might continue.[313] District Judge John Pickering of New Hampshire was relieved under Section 25 of the 1801 Act; repeal of the Act put him back on the bench and resulted in the first impeachment and conviction of a federal judge. Pickering's "high crimes and misdemeanors" were alcoholism and insanity.[314]

In 1809 Congress addressed the issue of district judge disability again. Although a proposed amendment to the Constitution that would have forbidden judges to serve after reaching age sixty-five failed to pass, Congress did pass a disability statute requiring the Supreme Court justice assigned to the circuit in which there was a disabled district judge to issue certiorari to the clerk of the district

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[310] McAllister, *supra* note 61, at A19.

[311] *Id.*

[312] A few studies already exist. *See, e.g.*, *Hearings*, *supra* note 297, at 24–26 (reviewing the legislative history of the senior judge system); Keeton, *supra* note 297, at 154 (reviewing the legislative history of the senior judge system); Wilfred Feinberg, *Senior Judges: A National Resource*, 56 BROOK. L. REV. 409, 418 (1990) (encouraging federal judges to work for as long as they are able to perform their jobs). In 1938, Charles Fairman did a study on judicial retirements which was confined to the Supreme Court. *See* Charles Fairman, *The Retirement of Federal Judges*, 51 HARV. L. REV. 397 (1938).

[313] *See* Act of Feb. 13, 1801, ch. 4, § 25, 2 Stat. 89, 97 (repealed 1802).

[314] One also might include "Federalism" among his crimes. *See* ELLIS, *supra* note 153, at 70-75 (discussing Pickering's impeachment in the context of the political struggle between the Federalists and the Republicans).

court to certify all pending matters to the next circuit court.[315] What this procedure did, of course, was simply to shift the burden of holding the district court to the justice sitting as a circuit judge "during the continuance of such disability."[316] No provision was made for the retirement of a permanently disabled judge, or for the appointment of a replacement.

Not until 1850 did Congress provide for the assignment, by a circuit judge or by the Chief Justice, of a district judge from another district to carry out the duties of a disabled district judge.[317] The illness of Samuel Rossiter Betts of the Southern District of New York had apparently prompted the introduction of special legislation, which was then converted into general legislation.[318] In 1863, Congress extended the coverage of the disability statute to include temporary assignment of judges to hold circuit courts as well.[319]

Although provisions existed for maintaining judicial efficiency by temporarily assigning able judges to stand in for disabled judges, it was still not possible for a disabled judge who did not meet the age and service requirements to retire from active service and receive his salary. As a result, Congress found itself passing special legislation on several occasions after 1869 until it enacted general legislation in 1919.

In 1875 Congress passed special legislation extending the benefits of the 1869 retirement act to the district judge of Vermont, David Allen Smalley, who had suffered a stroke.[320] Wilson McCandless of the Western District of Pennsylvania, who had served for twenty years, was not yet seventy when he became physically incapacitated for service. Congress responded to his incapacity by passing legislation in 1876 allowing him to retire under the provisions of the 1869 Act, provided that he resign within six months of the passage of the special act.[321] Similarly, in 1882, Congress made the same provision for Supreme Court Justice Ward

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[315] *See* Act of Mar. 2, 1809, ch. 27, 2 Stat. 534, 535.

[316] *Id.*

[317] *See* Act of July 29, 1850, ch. 22, 9 Stat. 442, 442.

[318] *See* CONG. GLOBE, 31st Cong., 1st Sess. 1439 (1850) (remarks of Mr. Thompson); *Resolutions and Other Proceedings upon the Retirement of Federal Judges*, 30 F. Cas. 1285 (1897) (providing biographical data on Judge Samuel Rossiter Betts who served in the Southern District of New York from 1826 to 1867).

[319] *See* Act of Mar. 3, 1863, ch. 93, § 1, 12 Stat. 768, 768.

[320] *See* Act of Feb. 18, 1875, ch. 83, 18 Stat. 329, 329.

[321] *See* Act of June 2, 1876, ch. 119, 19 Stat. 57, 57.

Hunt. Hunt had been on the Court for only six years when, on January 5, 1879, he was "struck speechless with paralysis."[322] It took three years of an understaffed Court before Congress acted in January of 1882 to allow Hunt to retire under the provisions of the 1869 Act, notwithstanding the fact that he fell short of the ten-year service requirement.[323]

In 1870, Congress responded to the petition of twenty-eight members of the Galveston bar and provided a pension for Texas District Court Judge Watrous, a judge who had served for twenty-four years, survived four impeachment attempts, and was one year short of retirement age.[324] In 1910, and again in 1922, Congress took the time to pass special retirement legislation for the benefit of Associate Justices William Moody and Mahlon Pitney.[325] Still, it was not until 1939 that Congress made any general provision for voluntary disability retirement.[326] In that year Congress passed an act allowing permanently disabled judges, regardless of age, who had served for less than ten years to retire on half pay; those who had served for ten years or more were permitted to retire on the salary they were receiving at the time of their retirement.[327]

In 1919, Congress dealt with the problem of the superannuated judge who refused to resign or retire in spite of disability. In the retirement act of that year, Congress authorized the President, "if he finds that any [active judge at least seventy years old with ten or more years of service] is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character," to appoint an additional judge.[328] The disabled judge would then be considered junior to all other judges in the district

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[322] *See* Goff, *supra* note 285, at 33 (footnote omitted).

[323] *See* Act of Jan. 27, 1882, ch. 4, 22 Stat. 2, 2.

[324] *See* Act of Apr. 5, 1870, ch. 44, 16 Stat. 81, 81; HAWKINS, *supra* note 184, at 62–64 (1950). Watrous was the subject of four impeachment investigations throughout the 1850s and is commonly thought to have resigned as a result. *See* BORKIN, *supra* note 14, at 253-54. However, he weathered all four, and his resignation in 1870 followed a paralytic stroke suffered in early 1869. *See* HAWKINS, *supra* note 184, at 62.

[325] *See* Act of June 23, 1910, ch. 377, 36 Stat. 1861, 1861 (providing for early retirement of William Moody); *see also* Act of Dec. 11, 1922, ch. 1, 42 Stat. 1063, 1063 (providing for early retirement of Mahlon Pitney).

[326] *See* Act of Aug. 5, 1939, ch. 433, § 1, 53 Stat. 1204, 1204. The disability provisions in the 1919 Act only applied to judges eligible to retire upon meeting the age and service requirements of 70 plus 10.

[327] *See id.*

[328] Act of Feb. 25, 1919, Pub. L. No. 265, 40 Stat. 1156, 1158.

or circuit.[329] In 1957 Congress authorized the circuit judicial councils to certify a judge as disabled by a majority vote of the members of the judge's judicial council. Such certification was then to be passed on to the President for the purposes of appointing another judge if the President agreed it was necessary.[330]

The statutes that have provided for judicial disability retirements over the years have allowed a certain amount of flexibility in dealing with judges unable to dispatch business in a reasonably efficient manner. But they have also caused a certain amount of confusion. The probable first use of the 1919 "involuntary" disability statute, occurring in 1928, illustrates the opacity of congressional intent in this area.

The lone district judge for the state of Kansas, seventy-year-old Judge John Pollock, under pressure of an overwhelming backlog and consequent unfavorable newspaper stories demanding his resignation, consulted the Retirement Act of 1919 and decided that if he refused to retire but asked the President to appoint an extra judge in light of the infirmities of his age, he could get some help with his docket without giving up his position. He wrote to his senators and to President Coolidge expressing his wishes: "Not intending to either retire or resign, I hereby respectfully request that you appoint an additional District Judge for the District of Kansas to assist me in accordance with [the involuntary disability provision]."[331] President Coolidge replied on December 12 that "your retirement effective at once is approved."[332] An "astonished" Judge Pollock immediately wired the President, exclaiming, "I have not retired," and reiterating that "[a]ll I have requested or consented to is appointment of [an] additional judge for this district."[333]

Judge Pollock's action prompted an extraordinary flurry of correspondence as well as an eight-page memorandum of law apparently from the Attorney General's office outlining the possible ramifications of Judge Pollock's unprecedented request.[334] The

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[329] *See id.*

[330] *See* Act of Sept. 2, 1957, Pub. L. No. 85-261, 71 Stat. 586 (amending 28 U.S.C. § 372).

[331] Letter from Judge John Pollock to President Calvin Coolidge (Dec. 5, 1927) (on file with AOUSC, Human Resources Division).

[332] Letter from President Calvin Coolidge to Judge John Pollock (Dec. 12, 1927) (on file with AOUSC, Human Resources Division).

[333] Telegram from Judge John Pollock to President Calvin Coolidge (Dec. 15, 1927) (on file with AOUSC, Human Resources Division).

[334] *See* Unsigned Memorandum from file on Judge John Pollock (on file with AOUSC, Human Resources Division).

Attorney General ultimately concluded that it would be better for the government in most cases to appoint extra judges under the involuntary disability provision because, unlike the "retirement from regular active service" section, disabled judges could be required rather than merely requested to work. The President ultimately appointed another judge.[335]

From Judge Pollock's perspective, the result of invoking the disability provision rather than retiring was mixed. He became junior to the new judge just as he would have had he retired. But he believed that under the disability section he would be protected from the effective removal that would occur if no designation to sit were forthcoming for him. As noted some time later by the circuit executive for the Seventh Circuit, "[s]enior district and circuit judges sit by designation. Their judicial career can be ended by . . . revoking or not issuing a designation."[336] It is not clear, however, that Judge Pollock was correct in his assessment of the effect of involuntary disability.

Since 1928, judges, the President, or circuit councils have invoked the involuntary disability provision at least ten other times.[337] In at least four, and probably six, of those cases, the involuntary disability provision was used so that the judges involved, who did not meet the service requirements for full-pay retirement, would be entitled to continue receiving their salaries. In at least one additional case, Judge A. Lee Wyman of South Dakota, who qualified for senior status and could continue to receive the salary of the office, refused to do so, but late in 1953 he requested that the President appoint an additional judge because of his disability. The Committee on Retirement of Judges of the Judicial Conference of the United States may have had Judge Wyman in mind when it noted that the committee had learned that in some instances, "judges contemplating retirement had hesitated to accept it because the term to them carried a connotation of inability to carry on judicial duties."[338] It therefore proposed that section 371(b) of

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[335] *See* Memorandum from Justice John Marshall to Everett Sanders (Jan. 20, 1928) (on file with AOUSC, Human Resources Division).

[336] Collins T. Fitzpatrick, *Misconduct and Disability of Federal Judges: The Unreported Informal Responses*, 71 JUDICATURE 282, 282 n.2 (1988).

[337] According to AOUSC files, the 10 judges who invoked the section are Pollock, Michie, Boyd, Wyman, Rizely, Burke, Roberts, Unthank, Cholakis, and Buinno. This number may underreport the number of occurrences, but it is clear that the section has not been invoked frequently.

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Title 28 "be amended so as to designate a judge taking advantage of the retirement provisions as 'senior judge' instead of his being called a 'retired judge' as at present."[339] Judge Wyman asked President Eisenhower to appoint an additional judge toward the end of 1953; it may be that the Committee on Retirement had learned of his case. Congress did not follow through on the Judicial Conference recommendation until 1958, five years after the "involuntary" disability of Judge Wyman.[340]

CONCLUSION

An observer of the Supreme Court once noted that "the old men of the court seldom died and never retired."[341] We know, however, that lower court judges as well as Supreme Court justices have retired, and that they have resigned as well. Judges have left office over the years, some in disgrace, many to pursue private-sector employment, some to seek other avenues of public service. What is perhaps most remarkable, however, is that the number of resignations have been so few. This low turnover may be interpreted in a number of ways, not all of them positive. Before retirement legislation was passed beginning in the 1860s, it is clear that many judges were staying on the bench beyond the point at which they could function effectively. And clearly some unfit judges have stayed on the bench because no one could figure out how to get them off. Still, the low turnover rate of federal judges does suggest a relatively high rate of job satisfaction, from the point of view of both the judges and those who are empowered to remove them.

Although this study shows that the known cases of judicial misconduct have often come to light in groups and do not tend to occur at regular rates, it cannot definitively answer the question of whether judicial misconduct is in fact on the rise. What it does show, however, is that the means for dealing with such misconduct has changed. Although a busy Congress quite reasonably presumed that efficiency would be served by entrusting "judicial discipline" involving criminal behavior to the Department of Justice, in every recent case the outcome has undercut that supposition. Criminal

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REPORT 8-9 (1954).

[339] *Id.* at 8.

[340] *See* Act of Aug. 25, 1958, Pub. L. No. 85-755, § 5, 72 Stat. 848, 849 (1958) (amending 28 U.S.C. § 294(b)).

[341] Goff, *supra* note 285, at 30 (quoting 2 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 956 (1964)).

convictions in the 1980s and early 1990s have not taken the impeachment burden off Congress. In fact, had Congress investigated and threatened to impeach Judges Claiborne, Hastings, Nixon, Aguilar, and Collins prior to their criminal convictions, it is quite possible that at least some of them would have resigned.

Without offering any conclusions about the motivations of past investigations and coercion of judges to resign, it is clear that these means have often proven very effective (although not uniformly so) in getting judges off the bench. On the other hand, the recent Department of Justice prosecutions of judges have not had the same effect.[342] One can certainly argue that the honorable thing for the recently prosecuted judges to do would have been to resign once they were indicted (as Martin Manton did in 1939), or at the very least, when they were setting off to jail (as Otto Kerner did in 1974). But it is not hard to see that if resignation were not offered by the Justice Department in cooperation with Congress as a form of plea-bargaining, once convicted, there would be no particular incentive for a judge to resign, and perhaps a strong incentive not to resign.[343]

For instance, after his criminal conviction, Harry Claiborne clearly saw the impeachment process as a second chance to vindicate himself.[344] Additionally, if a convicted judge runs the risk of disbarment, and thus cannot return to the lucrative practice of law to earn a living, that judge would have a clear incentive to hold on to the salary and benefits of judicial office as long as possible. And finally, a judge who has gone through a criminal trial, been convicted, and sent to prison is not likely to view impeachment with quite the same fear of public humiliation or as having quite the same level of threat to reputation as would a judge who has not had (and wishes to be spared) those experiences.

The policy question is whether the goal of prosecution and conviction is paramount, or whether removal of bad judges from the

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[342] Thomas E. Baker argues that "[t]he most telling point against reliance on the criminal-prosecution mechanism to increase judicial responsibility may be its practical inefficacy." TWENTIETH CENTURY FUND: TASK FORCE ON FEDERAL JUDICIAL RESPONSIBILITY, THE GOOD JUDGE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON FEDERAL JUDICIAL RESPONSIBILITY 62 (1989).

[343] On lack of congressional involvement, see Grimes, *supra* note 2 (documenting the decline in the number of congressional impeachment investigations during the past fifty years).

[344] "Judge Claiborne . . . has refused to resign because he said he wants to present his defense in an impeachment trial in the Senate." Wallace Turner, *Impeachment May Focus on Intrigue*, N.Y. TIMES, Aug. 11, 1986, at A20.

bench (with the risk that they might not ultimately be prosecuted) is the overriding goal. If removal is the goal, then the evidence suggests that the big stick of impeachment, prior to prosecution, effectively goads judges to voluntarily resign. It seems likely that impeachment is less of a threat when one has already been prosecuted than it would be in the absence of prosecution.

APPENDIX

TABLE 1

Judges Listed in Chronological Order with Reason for Termination

Year	*Name*	*Court*	*Reason for Resignation*
1790-1799			
1791	Rutledge, John	S. Ct.	*Appointment to Other Office*
1792	Lewis, William	E.D. Pa.	*Returned to Private Practice*
1793	Chipman, Nathaniel	D. Vt.	*Returned to Private Practice*
1793	Johnson, Thomas	S. Ct.	*Age/Health*
1794	Duane, James	D.N.Y.	*Age/Health*
1795	Jay, John	S. Ct.	*Elected Office*
1796	Blair, John	S. Ct.	*Age/Health*
1796	Laurance, John	D.N.Y.	*Elected Office*
1796	Pendleton, Nathaniel	D. Ga.	*Inadequate Salary*
1798	Troup, Robert	S.D.N.Y.	*Returned to Private Practice*
1800-1809			
1800	Ellsworth, Oliver	S. Ct.	*Age/Health*
1804	Moore, Alfred	S. Ct.	*Age/Health*
1804	Pickering, John	D.N.H.	*Impeachment & Conviction*
1806	Kilty, William	D.C. Cir.	*Appointment to Other Office*
1810-1819			
1813	Hall, Dominic A.	D. La.	*Inadequate Salary*
1818	Sewall, David	D. Me.	*Age/Health*
1818	Stephens, William	D. Ga.	*Allegations of Misbehavior*
1819	Tallmadge, Matthias B.	D.N.Y.	*Allegations of Misbehavior*
1820-1829			
1821	Davies, William	D. Ga.	*Elected Office*
1822	Parris, Albion K.	D. Me.	*Elected Office*

Year	*Name*	*Court*	*Reason for Resignation*
1824	Bland, Theodric	D. Md.	*Other Employment*
1824	Dick, John M.	D. La.	*Elected Office*
1825	Tucker, St. George	D. Va.	*Age/Health*
1826	Tait, Charles	D. Ala.	*Other Employment*
1830-1839			
1831	Wilkins, William	W.D. Pa.	*Elected Office*
1833	McNairy, John	D. Tenn.	*Age/Health*
1835	Duvall, Gabriel	S. Ct.	*Age/Health*
1836	Ellis, Powhatan	D. Miss.	*Appointment to Other Office*
1836	Glenn, Elias	D. Md.	*Age/Health*
1838	Adams, George	D. Miss.	*Dissatisfaction with Office*
1840-1849			
1841	Davis, John A.	D. Mass.	*Age/Health*
1841	Dickerson, Mahlon	D.N.J.	*Relinquished Court to Brother*
1842	Paine, Elijah	D. Vt.	*Age/Health*
1844	Mason, John Y.	E.D. Va.	*Appointment to Other Office*
1845	Pennybacker, Isaac S.	W.D. Va.	*Elected Office*
1850-1859			
1852	Conkling, Alfred	N.D.N.Y.	*Appointment to Other Office*
1857	Curtis, Benjamin R.	S. Ct.	*Dissatisfaction with Office*
1859	Irwin, Thomas	W.D. Pa.	*Allegations of Misbehavior*
1860-1869			
1860	Magrath, Andrew G.	D.S.C.	*Loyalty to the Confederacy*
1861	Biggs, Asa	D.N.C.	*Loyalty to the Confederacy*
1861	Boyce, Henry	W.D. La.	*Loyalty to the Confederacy*
1861	Brockenbrough, John W.	W.D. Va.	*Loyalty to the Confederacy*
1861	Campbell, John A.	S. Ct.	*Loyalty to the Confederacy*

Year	*Name*	*Court*	*Reason for Resignation*
1861	Gholson, Samuel J.	D. Miss.	*Loyalty to the Confederacy*
1861	Halyburton, James D.	E.D. Va.	*Loyalty to the Confederacy*
1861	Jones, William G.	D. Ala.	*Loyalty to the Confederacy*
1861	McCaleb, Theodore H.	D. La.	*Loyalty to the Confederacy*
1861	McIntosh, McQueen	N.D. Fla.	*Loyalty to the Confederacy*
1861	Monroe, Thomas B.	D. Ky.	*Loyalty to the Confederacy*
1861	Nicoll, John C.	D. Ga.	*Loyalty to the Confederacy*
1861	Ringo, Daniel	D. Ark.	*Loyalty to the Confederacy*
1861	Scarburgh, George P.	Ct. Cl.	*Loyalty to the Confederacy*
1862	McAllister, Matthew H.	Cal. Cir.	*Age/Health*
1862	Humphreys, West H.	D. Tenn.	*Impeachment & Conviction*
1863	Marvin, William	S.D. Fla.	*Age/Health*
1864	Hughes, James	Ct. Cl.	*Dissatisfaction with Office*
1865	Sprague, Peleg	D. Mass.	*Age/Health*
1865	Dick, Robert P.	D.N.C.	*Loyalty to the Confederacy*
1866	Ware, Ashur	D. Me.	*Age/Health*
1867	Betts, Samuel R.	S.D.N.Y.	*Age/Health*
1869	Boynton, Thomas J.	S.D. Fla.	*Age/Health*
1869	Bullock, Jonathan R.	D.R.I.	*Age/Health*
1869	Wilkins, Ross	D. Mich.	*Age/Health*

1870-1879

1870	Casey, Joseph	Ct. Cl.	*Age/Health*
1870	Fisher, George P.	D.D.C.	*Appointment to Other Office*
1870	Grier, Robert C.	S. Ct.	*Age/Health*
1870	Watrous, John C.	D. Tex.	*Age/Health*
1871	Hall, Willard	D. Del.	*Retired*
1871	Leavitt, Humphrey H.	D. Ohio	*Retired*
1872	Nelson, Samuel	S. Ct.	*Retired*
1873	Delahay, Mark W.	D. Kan.	*Impeached–Not Convicted*

Year	*Name*	*Court*	*Reason for Resignation*
1873	Sherman, Charles T.	N.D. Ohio	*Allegations of Misbehavior*
1873	Shipman, William D.	D. Ct.	*Inadequate Salary*
1874	Busteed, Richard	M.D. Ala.	*Allegations of Misbehavior*
1874	Durrell, Edward H.	E.D. La.	*Allegations of Misbehavior*
1875	Howe, James H.	E.D. Wis.	*Dissatisfaction with Office*
1875	Story, William	W.D. Ark.	*Allegations of Misbehavior*
1876	McCandless, Wilson	W.D. Pa.	*Disability*
1877	Davis, David	S. Ct.	*Elected Office*
1877	Loring, Edward G.	Ct. Cl.	*Retired*
1877	Smalley, David A.	D. Vt.	*Age/Health*
1878	Peck, Ebenezer	Ct. Cl.	*Retired*
1879	Dillon, John F.	8th Cir.	*Inadequate Salary*
1879	Olin, Abram B.	D.D.C.	*Retired*

1880-1889

1880	Strong, William	S. Ct.	*Retired*
1881	Davis, John C.B.	Ct. Cl.	*Appointment to Other Office*
1881	Hunt, William H.	Ct. Cl.	*Appointment to Other Office*
1881	Knowles, John P.	D.R.I.	*Retired*
1882	Hunt, Ward	S. Ct.	*Retired*
1883	Davis, John C.B.	Ct. Cl.	*Other Employment*
1883	Erskine, John	D. Ga.	*Retired*
1883	Gresham, Walter Q.	D. Ind.	*Appointment to Other Office*
1883	Morrill, Amos	E.D. Tex.	*Age/Health*
1884	Drummond, Thomas	7th Cir.	*Retired*
1884	Lowell, John	1st Cir.	*Returned to Private Practice*
1884	McCrary, George W.	8th Cir.	*Inadequate Salary*
1885	Drake, Charles D.	Ct. Cl.	*Retired*
1885	Wylie, Andrew	D.D.C.	*Retired*
1886	Bryan, George S.	D.S.C.	*Retired*

Year	*Name*	*Court*	*Reason for Resignation*
1887	MacArthur, Arthur	D.D.C.	*Retired*
1887	Treat, Samuel	E.D. Mo.	*Retired*
1888	Dyer, Charles E.	E.D. Wis.	*Other Employment*
1888	Krekel, Arnold	W.D. Mo.	*Age/Health*
1890-1899			
1891	Hill, Robert A.	D. Miss.	*Retired*
1891	McKennan, William	3d Cir.	*Retired*
1891	Scofield, Glenni W.	Ct. Cl.	*Retired*
1892	Blodgett, Henry	N.D. Ill.	*Appointment to Other Office*
1892	Montgomery, Martin V.	D.D.C.	*Returned to Private Practice*
1892	Reed, James Hay	W.D. Pa.	*Returned to Private Practice*
1893	Gresham, Walter Q.	7th Cir.	*Appointment to Other Office*
1895	Priest, Henry S.	E.D. Mo.	*Returned to Private Practice*
1897	Benedict, Charles L.	E.D.N.Y.	*Retired*
1897	Field, Stephen J.	S. Ct.	*Retired*
1898	Dick, Robert P.	W.D.N.C.	*Age/Health*
1898	Hughes, Robert W.	E.D. Va.	*Retired*
1899	Butler, William	E.D. Pa.	*Retired*
1899	Cox, Walter S.	D.D.C.	*Retired*
1899	Foster, Cassius G.	D. Kan.	*Age/Health*
1899	McComas, Louis E.	D.D.C.	*Elected Office*
1900-1909			
1900	Taft, William H.	6th Cir.	*Appointment to Other Office*
1902	Shipman, Nathaniel	2d Cir.	*Retired*
1902	Webb, Nathan	D. Me.	*Retired*
1903	Caldwell, Henry C.	8th Cir.	*Retired*
1903	Hagner, Alexander B.	D.D.C.	*Retired*
1903	Shiras, George	S. Ct.	*Retired*

Year	*Name*	*Court*	*Reason for Resignation*
1903	Shiras, Oliver P.	N.D. Iowa	*Retired*
1904	Alvey, Richard H.	D.C. Cir.	*Retired*
1904	Wing, Francis J.	N.D. Ohio	*Returned to Private Practice*
1905	Bunn, Romanzo	W.D. Wis.	*Retired*
1905	Jackson, John J.	W.D. Va.	*Retired*
1905	Jenkins, James G.	7th Cir.	*Retired*
1905	Morris, Martin F.	D.C. Cir.	*Retired*
1905	Nott, Charles C.	Ct. Cl.	*Retired*
1906	Brown, Henry B.	S. Ct.	*Retired*
1906	Duell, Charles H.	D.C. Cir.	*Returned to Private Practice*
1906	Hallett, Moses	D. Colo.	*Retired*
1906	Hawley, Thomas P.	D. Nev.	*Retired*
1906	Wheeler, Hoyt H.	D. Vt.	*Retired*
1907	Finkelnburg, Gustavus A.	E.D. Mo.	*Age/Health*
1907	Wallace, William J.	N.D.N.Y.	*Retired*
1908	Ewing, Nathaniel	W.D. Pa.	*Other Employment*
1908	Lochren, William	D. Minn.	*Retired*
1909	Dallas, George M.	3d Cir.	*Retired*

1910-1919

1910	Moody, William H.	S. Ct.	*Age/Health*
1910	Saunders, Eugene D.	E.D. La.	*Inadequate Salary*
1911	Brawley, William H.	D.S.C.	*Retired*
1911	Grosscup, Peter S.	7th Cir.	*Allegations of Misbehavior*
1911	Rasch, Carl L.	D. Mont.	*Dissatisfaction with Office*
1912	Angell, Alexis C.	E.D. Mich.	*Returned to Private Practice*
1912	Donworth, George	W.D. Wash.	*Returned to Private Practice*
1912	Hanford, Cornelius H.	W.D. Wash.	*Allegations of Misbehavior*
1912	Locke, James W.	S.D. Fla.	*Retired*

Year	*Name*	*Court*	*Reason for Resignation*
1913	Archibald, Robert W.	3d Cir.	*Impeachment & Conviction*
1913	Colt, LeBaron B.	1st Cir.	*Elected Office*
1913	Goff, Nathan	4th Cir.	*Elected Office*
1913	Noyes, Walter	2d Cir.	*Inadequate Salary*
1913	Peelle, Stanton J.	Ct. Cl.	*Retired*
1914	Day, William L.	N.D. Ohio	*Inadequate Salary*
1914	Holt, George C.	S.D.N.Y.	*Retired*
1914	Wright, Daniel T.	D.D.C.	*Allegations of Misbehavior*
1915	Howry, Charles B.	Ct. Cl.	*Retired*
1915	Marshall, John A.	D. Utah	*Allegations of Misbehavior*
1916	Atkinson, George W.	Ct. Cl.	*Retired*
1916	Hughes, Charles E.	S. Ct.	*Sought Elected Office–Defeated*
1917	Coxe, Alfred C.	2d Cir.	*Retired*
1917	Putnam, William L.	1st Cir.	*Retired*
1917	Veeder, Van Vetchen	E.D.N.Y.	*Returned to Private Practice*
1918	Bradford, Edward G.	D. Del.	*Retired*
1918	Campbell, Ralph	E.D. Okla.	*Other Employment*
1918	Covington, James H.	D.D.C.	*Returned to Private Practice*
1918	Dodge, Frederic	1st Cir.	*Retired*
1918	Dyer, David P.	E.D. Mo.	*Retired*
1919	Batts, Robert L.	5th Cir.	*Other Employment*
1920-1929			
1920	Haight, Thomas G.	3d Cir.	*Returned to Private Practice*
1922	Clarke, John H.	S. Ct.	*Dissatisfaction with Office*
1922	De Vries, M.	Ct. Cust. App.	*Returned to Private Practice*
1922	Landis, Kenesaw M.	N.D. Ill.	*Allegations of Misbehavior*
1922	Pitney, Mahlon	S. Ct.	*Age/Health*
1923	Peck, John W.	S.D. Ohio	*Returned to Private Practice*

Year	*Name*	*Court*	*Reason for Resignation*
1924	Mayer, Julius	2d Cir.	*Dissatisfaction with Office*
1925	Bledsoe, Benjamin F.	S.D. Cal.	*Sought Elected Office–Defeated*
1925	Garvin, Edwin L.	E.D.N.Y.	*Inadequate Salary*
1925	King, Alexander C.	5th Cir.	*Age/Health*
1925	Lynch, Charles F.	D.N.J.	*Inadequate Salary*
1925	McKenna, Joseph	S. Ct.	*Retired*
1926	English, George W.	E.D. Ill.	*Impeached–Not Convicted*
1927	Hoehling, Adolph A.	D.D.C.	*Returned to Private Practice*
1929	Bodine, Joseph L.	D.N.J.	*Appointment to Other Office*
1929	Henning, Edward J.	S.D. Cal.	*Returned to Private Practice*
1929	McCarthy, James W.	D.N.J.	*Age/Health*
1929	Winslow, Francis A.	S.D.N.Y.	*Allegations of Misbehavior*
1930-1939			
1930	Burrows, Warren B.	D. Conn.	*Elected Office*
1930	Morris, Hugh M.	D. Del.	*Returned to Private Practice*
1930	Thacher, Thomas D.	S.D.N.Y.	*Appointment to Other Office*
1931	Denison, Arthur	6th Cir.	*Returned to Private Practice*
1933	Carpenter, George A.	N.D. Ill.	*Returned to Private Practice*
1934	Bourquin, George M.	D. Mont.	*Sought Elected Office–Defeated*
1935	Dawson, Charles I.	W.D. Ky.	*Returned to Private Practice*
1935	Letts, Ira L.	D.R.I.	*Returned to Private Practice*
1936	Rippey, Harlan W.	W.D.N.Y.	*Appointment to Other Office*
1936	Ritter, Halsted L.	S.D. Fla.	*Impeachment & Conviction*
1938	Buffington, Joseph	3d Cir.	*Allegations of Misbehavior*
1939	Manton, Martin T.	2d Cir.	*Allegations of Misbehavior*
1939	Thomas, Edwin S.	D. Conn.	*Allegations of Misbehavior*
1940-1949			
1940	Biddle, Francis	3d Cir.	*Appointment to Other Office*

Year	*Name*	*Court*	*Reason for Resignation*
1940	Howe, Harland B.	D. Vt.	*Disability*
1940	Kennamer, Franklin E.	N.D. Okla.	*Age/Health*
1940	Patterson, Robert	2d Cir.	*Appointment to Other Office*
1941	Lumpkin, Alva M.	E.D.S.C./ W.D.S.C.	*Elected Office*
1941	McLellan, Hugh D.	D. Mass.	*Returned to Private Practice*
1942	Byrnes, James F.	S. Ct.	*Appointment to Other Office*
1942	Clark, William	3d Cir.	*Military Service*
1943	Vinson, Fred M.	D.C. Cir.	*Appointment to Other Office*
1944	Jones, Charles A.	3d Cir.	*Appointment to Other Office*
1945	Johnson, Albert W.	M.D. Pa.	*Allegations of Misbehavior*
1945	Schwellenbach, Lewis B.	E.D. Wash.	*Appointment to Other Office*
1946	Adkins, Jesse C.	D.D.C.	*Disability*
1947	Pollard, Robert N.	E.D. Va.	*Age/Health?*
1948	Kampf, Edward S.	N.D.N.Y.	*Retired*
1950-1959			
1950	Mahoney, John C.	1st Cir.	*Age/Health*
1950	Rifkind, Simon H.	S.D.N.Y.	*Inadequate Salary*
1952	Bard, Guy K.	E.D. Pa.	*Sought Elected Office–Defeated*
1952	Kennedy, Harold M.	E.D.N.Y.	*Inadequate Salary*
1952	Leavy, Charles H.	W.D. Wash.	*Disability*
1952	McGranery, James P.	E.D. Pa.	*Appointment to Other Office*
1953	Howell, George E.	Ct. Cl.	*Appointment to Other Office*
1953	Mullins, Clarence H.	N.D. Ala.	*Disability*
1955	Kaufman, Samuel H.	S.D.N.Y.	*Age/Health*
1957	Walsh, Lawrence E.	S.D.N.Y.	*Appointment to Other Office*

Year	*Name*	*Court*	*Reason for Resignation*
1960-1969			
1961	Savage, Royce H.	N.D. Okla.	*Other Employment*
1962	Whittaker, Charles E.	S. Ct.	*Age/Health*
1963	Preyer, Lunsford R.	M.D.N.C.	*Sought Elected Office–Defeated*
1965	Goldberg, Arthur J.	S. Ct.	*Appointment to Other Office*
1967	Lane, Arthur S.	D.N.J.	*Other Employment*
1967	Michie, Thomas J.	W.D. Va.	*Disability*
1969	Fortas, Abe	S. Ct.	*Allegations of Misbehavior*
1970-1979			
1970	Carswell, George H.	5th Cir.	*Sought Elected Office–Defeated*
1970	Combs, Bertram T.	6th Cir.	*Returned to Private Practice*
1973	Masterson, Thomas	E.D. Pa.	*Inadequate Salary*
1974	Bauman, Arnold	S.D.N.Y.	*Inadequate Salary*
1974	Kerner, Otto	7th Cir.	*Allegations of Misbehavior*
1974	Middlebrooks, David L.	N.D. Fla.	*Dissatisfaction with Office*
1974	Smith, Sidney O.	N.D. Ga.	*Inadequate Salary*
1974	Travia, Anthony J.	E.D.N.Y.	*Dissatisfaction with Office*
1975	Tyler, Harold R.	S.D.N.Y.	*Appointment to Other Office*
1976	Bell, Griffin B.	5th Cir.	*Dissatisfaction with Office*
1976	Comiskey, James A.	E.D. La.	*Other Employment*
1976	Scalera, Ralph F.	W.D. Pa.	*Returned to Private Practice*
1977	McCree, Wade H.	6th Cir.	*Appointment to Other Office*
1978	Fogel, Herbert A.	E.D. Pa.	*Allegations of Misbehavior*
1978	Frankel, Marvin E.	S.D.N.Y.	*Dissatisfaction with Office*
1978	Morris, Joseph W.	E.D. Okla.	*Other Employment*
1978	Webster, William H.	8th Cir.	*Appointment to Other Office*
1979	Cowan, Finis E.	S.D. Tex.	*Returned to Private Practice*
1979	Hufstedler, Shirley M.	9th Cir.	*Appointment to Other Office*

Year	*Name*	*Court*	*Reason for Resignation*
1980-1989			
1980	Mitchell, George J.	D. Me.	*Appointment to Other Office*
1980	Renfrew, Charles B.	N.D. Cal.	*Appointment to Other Office*
1980	Tone, Phillip W.	7th Cir.	*Dissatisfaction with Office*
1981	Crowley, John P.	N.D. Ill.	*Returned to Private Practice*
1981	Hermansdorfer, Howard	E.D. Ky.	*Returned to Private Practice*
1981	Mulligan, William H.	2d Cir.	*Inadequate Salary*
1982	Jones, Shirley B.	D. Md.	*Returned to Private Life*
1982	McFadden, Frank H.	N.D. Ala.	*Inadequate Salary*
1983	Boyle, Patricia J.	E.D. Mich.	*Appointment to Other Office*
1983	Higby, Lynn C.	N.D. Fla.	*Inadequate Salary*
1983	Meanor, H. Curtis	D.N.J.	*Returned to Private Practice*
1984	Lucas, Malcolm M.	C.D. Cal.	*Appointment to Other Office*
1984	O'Conor, Robert	S.D. Tex.	*Returned to Private Practice*
1984	Shannon, Fred	W.D. Tex.	*Returned to Private Practice*
1985	Duncan, Robert M.	S.D. Ohio	*Returned to Private Practice*
1985	Reed, John A.	M.D. Fla.	*Returned to Private Practice*
1985	Sofaer, Abraham	S.D.N.Y.	*Appointment to Other Office*
1986	Claiborne, Harry	D. Nev.	*Impeachment & Conviction*
1986	Miller, James R.	D. Md.	*Age/Health*
1986	Sneeden, Emory M.	4th Cir.	*Inadequate Salary*
1987	Getzendanner, Susan	N.D. Ill.	*Returned to Private Practice*
1987	Sessions, William S.	W.D. Tex.	*Appointment to Other Office*
1987	Stern, Herbert J.	D.N.J.	*Returned to Private Practice*
1988	Bork, Robert H.	D.C. Cir.	*Dissatisfaction with Office*
1988	McDonald, Gabrielle K.	S.D. Tex.	*Dissatisfaction with Office*
1989	Hastings, Alcee L.	S.D. Fla.	*Impeachment & Conviction*
1989	McQuade, Richard B.	N.D. Ohio	*Other Employment*
1989	Nixon, Walter L.	S.D. Miss.	*Impeachment & Conviction*

Year	*Name*	*Court*	*Reason for Resignation*
1989	Ramirez, Raul A.	E.D. Cal.	*Inadequate Salary*
1989	Starr, Kenneth W.	D.C. Cir.	*Appointment to Other Office*
1990-Present			
1990	Bonner, Robert C.	C.D. Cal.	*Appointment to Other Office*
1990	Irving, J. Lawrence	S.D. Cal.	*Dissatisfaction with Office*
1990	Scott, Thomas E.	S.D. Fla.	*Returned to Private Practice*
1991	Phillips, Layn R.	W.D. Okla.	*Inadequate Salary*
1993	Boudin, Michael	D.D.C.	*Dissatisfaction with Office*

TABLE 2
Judges Listed by Reason for Termination

Year	*Name*	*Court*
Age/Health		
1793	Johnson, Thomas	S. Ct.
1794	Duane, James	D.N.Y.
1796	Blair, John	S. Ct.
1800	Ellsworth, Oliver	S. Ct.
1804	Moore, Alfred	S. Ct.
1818	Sewall, David	D. Me.
1825	Tucker, St. George	D. Va.
1833	McNairy, John	D. Tenn.
1835	Duvall, Gabriel	S. Ct.
1836	Glenn, Elias	D. Md.
1841	Davis, John A.	D. Mass.
1842	Paine, Elijah	D. Vt.
1862	McAllister, Matthew H.	Cal. Cir.
1863	Marvin, William	S.D. Fla.
1865	Sprague, Peleg	D. Mass.
1866	Ware, Ashur	D. Me.
1867	Betts, Samuel R.	S.D.N.Y.
1869	Boynton, Thomas J.	S.D. Fla.
1869	Bullock, Jonathan R.	D.R.I.
1869	Wilkins, Ross	D. Mich.
1870	Casey, Joseph	Ct. Cl.
1870	Grier, Robert C.	S. Ct.
1870	Watrous, John C.	D. Tex.
1877	Smalley, David A.	D. Vt.
1883	Morrill, Amos	E.D. Tex.
1888	Krekel, Arnold	W.D. Mo.

Year	*Name*	*Court*
1898	Dick, Robert P.	W.D.N.C.
1899	Foster, Cassius G.	D. Kan.
1907	Finkelnburg, Gustavus A.	E.D. Mo.
1910	Moody, William H.	S. Ct.
1922	Pitney, Mahlon	S. Ct.
1925	King, Alexander C.	5th Cir.
1929	McCarthy, James W.	D.N.J.
1940	Kennamer, Franklin E.	N.D. Okla.
1947	Pollard, Robert N.	E.D. Va.
1950	Mahoney, John C.	1st Cir.
1955	Kaufman, Samuel H.	S.D.N.Y.
1962	Whittaker, Charles E.	S. Ct.
1986	Miller, James R.	D. Md.

Allegations of Misbehavior

1818	Stephens, William	D. Ga.
1819	Tallmadge, Matthias B.	D.N.Y.
1859	Irwin, Thomas	W.D. Pa.
1873	Sherman, Charles T.	N.D. Ohio
1874	Busteed, Richard	M.D. Ala.
1874	Durrell, Edward H.	E.D. La.
1875	Story, William	W.D. Ark.
1911	Grosscup, Peter S.	7th Cir.
1912	Hanford, Cornelius H.	W.D. Wash.
1914	Wright, Daniel T.	D.D.C.
1915	Marshall, John A.	D. Utah
1922	Landis, Kenesaw M.	N.D. Ill.
1929	Winslow, Francis A.	S.D.N.Y.
1938	Buffington, Joseph	3d Cir.
1939	Manton, Martin T.	2d Cir.

Year	*Name*	*Court*
1939	Thomas, Edwin S.	D. Conn.
1945	Johnson, Albert W.	M.D. Pa.
1969	Fortas, Abe	S. Ct.
1974	Kerner, Otto	7th Cir.
1978	Fogel, Herbert A.	E.D. Pa.
Appointment to Other Office		
1791	Rutledge, John	S. Ct.
1806	Kilty, William	D.C. Cir.
1836	Ellis, Powhatan	D. Miss.
1844	Mason, John Y.	E.D. Va.
1852	Conkling, Alfred	N.D.N.Y.
1870	Fisher, George P.	D.D.C.
1881	Davis, John C.B.	Ct. Cl.
1881	Hunt, William H.	Ct. Cl.
1883	Gresham, Walter Q.	D. Ind.
1892	Blodgett, Henry	N.D. Ill.
1893	Gresham, Walter Q.	7th Cir.
1900	Taft, William H.	6th Cir.
1929	Bodine, Joseph L.	D.N.J.
1930	Thacher, Thomas D.	S.D.N.Y.
1936	Rippey, Harlan W.	W.D.N.Y.
1940	Biddle, Francis	3d Cir.
1940	Patterson, Robert	2d Cir.
1942	Byrnes, James F.	S. Ct.
1943	Vinson, Fred M.	D.C. Cir.
1944	Jones, Charles A.	3d Cir.
1945	Schwellenbach, Lewis B.	E.D. Wash.
1952	McGranery, James P.	E.D. Pa.
1953	Howell, George E.	Ct. Cl.

Year	*Name*	*Court*
1957	Walsh, Lawrence E.	S.D.N.Y.
1965	Goldberg, Arthur J.	S. Ct.
1975	Tyler, Harold R.	S.D.N.Y.
1977	McCree, Wade H.	6th Cir.
1978	Webster, William H.	8th Cir.
1979	Hufstedler, Shirley M.	9th Cir.
1980	Mitchell, George J.	D. Me.
1980	Renfrew, Charles B.	N.D. Cal.
1983	Boyle, Patricia J.	E.D. Mich.
1984	Lucas, Malcolm M.	C.D. Cal.
1985	Sofaer, Abraham	S.D.N.Y.
1987	Sessions, William S.	W.D. Tex.
1989	Starr, Kenneth W.	D.C. Cir.
1990	Bonner, Robert C.	C.D. Cal.
Disability		
1876	McCandless, Wilson	W.D. Pa.
1940	Howe, Harland B.	D. Vt.
1946	Adkins, Jesse C.	D.D.C.
1952	Leavy, Charles H.	W.D. Wash.
1953	Mullins, Clarence H.	N.D. Ala.
1967	Michie, Thomas J.	W.D. Va.
Dissatisfaction with Office		
1838	Adams, George	D. Miss.
1857	Curtis, Benjamin R.	S. Ct.
1864	Hughes, James	Ct. Cl.
1875	Howe, James H.	E.D. Wis.
1911	Rasch, Carl L.	D. Mont.
1922	Clarke, John H.	S. Ct.

Year	*Name*	*Court*
1924	Mayer, Julius	2d Cir.
1974	Middlebrooks, David L.	N.D. Fla.
1974	Travia, Anthony J.	E.D.N.Y.
1976	Bell, Griffin B.	5th Cir.
1978	Frankel, Marvin E.	S.D.N.Y.
1980	Tone, Phillip W.	7th Cir.
1988	Bork, Robert H.	D.C. Cir.
1988	McDonald, Gabrielle K.	S.D. Tex.
1990	Irving, J. Lawrence	S.D. Cal.
1993	Boudin, Michael	D.D.C.
Elected Office		
1795	Jay, John	S. Ct.
1796	Laurance, John	D.N.Y.
1821	Davies, William	D. Ga.
1822	Parris, Albion K.	D. Me.
1824	Dick, John M.	D. La.
1831	Wilkins, William	W.D. Pa.
1845	Pennybacker, Isaac S.	W.D. Va.
1877	Davis, David	S. Ct.
1899	McComas, Louis E.	D.D.C.
1913	Colt, LeBaron B.	1st Cir.
1913	Goff, Nathan	4th Cir.
1930	Burrows, Warren B.	D. Conn.
1941	Lumpkin, Alva M.	E.D.S.C./ W.D.S.C.
Impeachment & Conviction		
1804	Pickering, John	D.N.H.
1862	Humphreys, West H.	D. Tenn.
1913	Archibald, Robert W.	3d Cir.

Year	*Name*	*Court*
1936	Ritter, Halsted L.	S.D. Fla.
1986	Claiborne, Harry	D. Nev.
1989	Hastings, Alcee L.	S.D. Fla.
1989	Nixon, Walter L.	S.D. Miss.
Impeached–Not Convicted		
1873	Delahay, Mark W.	D. Kan.
1926	English, George W.	E.D. Ill.
Inadequate Salary		
1813	Hall, Dominic A.	D. La.
1873	Shipman, William D.	D. Ct.
1879	Dillon, John F.	8th Cir.
1884	McCrary, George W.	8th Cir.
1910	Saunders, Eugene D.	E.D. La.
1913	Noyes, Walter	2d Cir.
1914	Day, William L.	N.D. Ohio
1925	Garvin, Edwin L.	E.D.N.Y.
1925	Lynch, Charles F.	D.N.J.
1950	Rifkind, Simon H.	S.D.N.Y.
1952	Kennedy, Harold M.	E.D.N.Y.
1973	Masterson, Thomas	E.D. Pa.
1974	Bauman, Arnold	S.D.N.Y.
1974	Smith, Sidney O.	N.D. Ga.
1981	Mulligan, William H.	2d Cir.
1982	McFadden, Frank H.	N.D. Ala.
1983	Higby, Lynn C.	N.D. Fla.
1986	Sneeden, Emory M.	4th Cir.
1989	Ramirez, Raul A.	E.D. Cal.
1991	Phillips, Layn R.	W.D. Okla.

Year	*Name*	*Court*
Loyalty to the Confederacy		
1860	Magrath, Andrew G.	D.S.C.
1861	Biggs, Asa	D.N.C.
1861	Boyce, Henry	W.D. La.
1861	Brockenbrough, John W.	W.D. Va.
1861	Campbell, John A.	S. Ct.
1861	Gholson, Samuel J.	D. Miss.
1861	Halyburton, James D.	E.D. Va.
1861	Jones, William G.	D. Ala.
1861	McCaleb, Theodore H.	D. La.
1861	McIntosh, McQueen	N.D. Fla.
1861	Monroe, Thomas B.	D. Ky.
1861	Nicoll, John C.	D. Ga.
1861	Ringo, Daniel	D. Ark.
1861	Scarburgh, George P.	Ct. Cl.
1865	Dick, Robert P.	D.N.C.
Military Service		
1942	Clark, William	3d Cir.
Other Employment		
1824	Bland, Theodric	D. Md.
1826	Tait, Charles	D. Ala.
1883	Davis, John C.B.	Ct. Cl.
1888	Dyer, Charles E.	E.D. Wis.
1908	Ewing, Nathaniel	W.D. Pa.
1918	Campbell, Ralph	E.D. Okla.
1919	Batts, Robert L.	5th Cir.
1961	Savage, Royce H.	N.D. Okla.
1967	Lane, Arthur S.	D.N.J.

Year	*Name*	*Court*
1976	Comiskey, James A.	E.D. La.
1978	Morris, Joseph W.	E.D. Okla.
1989	McQuade, Richard B.	N.D. Ohio
Relinquished Court to Brother		
1841	Dickerson, Mahlon	D.N.J.
Retired		
1871	Hall, Willard	D. Del.
1871	Leavitt, Humphrey H.	D. Ohio
1872	Nelson, Samuel	S. Ct.
1877	Loring, Edward G.	Ct. Cl.
1878	Peck, Ebenezer	Ct. Cl.
1879	Olin, Abram B.	D.D.C.
1880	Strong, William	S. Ct.
1881	Knowles, John P.	D.R.I.
1882	Hunt, Ward	S. Ct.
1883	Erskine, John	D. Ga.
1884	Drummond, Thomas	7th Cir.
1885	Drake, Charles D.	Ct. Cl.
1885	Wylie, Andrew	D.D.C.
1886	Bryan, George S.	D.S.C.
1887	MacArthur, Arthur	D.D.C.
1887	Treat, Samuel	E.D. Mo.
1891	Hill, Robert A.	D. Miss.
1891	McKennan, William	3d Cir.
1891	Scofield, Glenni W.	Ct. Cl.
1897	Benedict, Charles L.	E.D.N.Y.
1897	Field, Stephen J.	S. Ct.
1898	Hughes, Robert W.	E.D. Va.

Year	*Name*	*Court*
1899	Butler, William	E.D. Pa.
1899	Cox, Walter S.	D.D.C.
1902	Shipman, Nathaniel	2d Cir.
1902	Webb, Nathan	D. Me.
1903	Caldwell, Henry C.	8th Cir.
1903	Hagner, Alexander B.	D.D.C.
1903	Shiras, George	S. Ct.
1903	Shiras, Oliver P.	N.D. Iowa
1904	Alvey, Richard H.	D.C. Cir.
1905	Bunn, Romanzo	W.D. Wis.
1905	Jackson, John J.	W.D. Va.
1905	Jenkins, James G.	7th Cir.
1905	Morris, Martin F.	D.C. Cir.
1905	Nott, Charles C.	Ct. Cl.
1906	Brown, Henry B.	S. Ct.
1906	Hallett, Moses	D. Colo.
1906	Hawley, Thomas P.	D. Nev.
1906	Wheeler, Hoyt H.	D. Vt.
1907	Wallace, William J.	N.D.N.Y.
1908	Lochren, William	D. Minn.
1909	Dallas, George M.	3d Cir.
1911	Brawley, William H.	D.S.C.
1912	Locke, James W.	S.D. Fla.
1913	Peelle, Stanton J.	Ct. Cl.
1914	Holt, George C.	S.D.N.Y.
1915	Howry, Charles B.	Ct. Cl.
1916	Atkinson, George W.	Ct. Cl.
1917	Coxe, Alfred C.	2d Cir.
1917	Putnam, William L.	1st Cir.
1918	Bradford, Edward G.	D. Del.

Year	*Name*	*Court*
1918	Dodge, Frederic	1st Cir.
1918	Dyer, David P.	E.D. Mo.
1925	McKenna, Joseph	S. Ct.
1948	Kampf, Edward S.	N.D.N.Y.
Returned to Private Practice		
1792	Lewis, William	E.D. Pa.
1793	Chipman, Nathaniel	D. Vt.
1798	Troup, Robert	S.D.N.Y.
1884	Lowell, John	1st Cir.
1892	Montgomery, Martin V.	D.D.C.
1892	Reed, James Hay	W.D. Pa.
1895	Priest, Henry S.	E.D. Mo.
1904	Wing, Francis J.	N.D. Ohio
1906	Duell, Charles H.	D.C. Cir.
1912	Angell, Alexis C.	E.D. Mich.
1912	Donworth, George	W.D. Wash.
1917	Veeder, Van Vetchen	E.D.N.Y.
1918	Covington, James H.	D.D.C.
1920	Haight, Thomas G.	3d Cir.
1922	De Vries, M.	Ct. Cust. App.
1923	Peck, John W.	S.D. Ohio
1927	Hoehling, Adolph A.	D.D.C.
1929	Henning, Edward J.	S.D. Cal.
1930	Morris, Hugh M.	D. Del.
1931	Denison, Arthur	6th Cir.
1933	Carpenter, George A.	N.D. Ill.
1935	Dawson, Charles I.	W.D. Ky.
1935	Letts, Ira L.	D.R.I.
1941	McLellan, Hugh D.	D. Mass.

Year	*Name*	*Court*
1970	Combs, Bertram T.	6th Cir.
1976	Scalera, Ralph F.	W.D. Pa.
1979	Cowan, Finis E.	S.D. Tex.
1981	Crowley, John P.	N.D. Ill.
1981	Hermansdorfer, Howard D.	E.D. Ky.
1982	Jones, Shirley B.	D. Md.
1983	Meanor, H. Curtis	D.N.J.
1984	O'Conor, Robert	S.D. Tex.
1984	Shannon, Fred	W.D. Tex.
1985	Duncan, Robert M.	S.D. Ohio
1985	Reed, John A.	M.D. Fla.
1987	Getzendanner, Susan	N.D. Ill.
1987	Stern, Herbert J.	D.N.J.
1990	Scott, Thomas E.	S.D. Fla.
Sought Elected Office–Defeated		
1916	Hughes, Charles E.	S. Ct.
1925	Bledsoe, Benjamin F.	S.D. Cal.
1934	Bourquin, George M.	D. Mont.
1952	Bard, Guy K.	E.D. Pa.
1963	Preyer, Lunsford R.	M.D.N.C.
1970	Carswell, George H.	5th Cir.